UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026

- -x

In Re:

GENERAL MOTORS CORPORATION, et al.,

Debtor.

- -x

United States Bankruptcy Court

Southern District of New York

One Bowling Green

New York, New York 10004

April 12, 2012

9:51 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

Omnibus Objection to Claim(s) Number: 269th (Insufficient Documentation)

Omnibus Objection to Claim(s) Number 270th (No Liability Claims)

Motion of the Revitalizing Auto Communities Environmental Response Trust For An Order Pursuant to 11 U.S.C. §§ 105 and 1142 To Enforce Debtors' Payment Obligations Under The Second Amended Joint Chapter 11 Plan And The Confirmation Order

Transcribed by: Nick Gereffi

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P R O C E E D I N G S

THE COURT: Good morning. Have seats, please.

All right. Good morning. Today, on Motors Liquidation Corporation GM, we have, as I understand it, a couple of unopposed matters and then the major event today, which are the issues visa vie the RACER Trust. On the last of those, I have some preliminary remarks. I'm going to want people to make appearances and then to sit down while I make them. Do we have preliminary matters first?

MS. WHITMAN: Good morning, Your Honor. Mikaela Whitman from Dickstein Shapiro on behalf of the Motors Liquidation GUP Trust.

Your Honor, today, we have two uncontensted omnibus objections before the Court. We have the 269th Omnibus Objection, which is an objection based on insufficient documentation. From that objection, three have been adjourned, five objections have been withdrawn, and 57 are going forward today. We also have the 270th Omnibus Objection before this Court. This is a no liability objection. From that objection, all 56 claims are going forward today.

Unless Your Honor has any objections, I'd like to ask Your Honor to approve these omnibus objections and permission to submit the orders to chambers.

THE COURT: Certainly. That's granted. My courtroom deputy isn't here today. I don't want to burden the

proceedings by asking my law clerks to do it in her absence, so let me ask you to simply work it out with my law clerks after today's hearing.

MS. WHITMAN: Certainly, Your Honor.

THE COURT: Thank you, Ms. Whitman. Does that do it for you?

MS. WHITMAN: Thank you. May I be excused?

THE COURT: Yes, you are, and if you would like to leave the lengthy proceedings that I suspect you're going to follow --

MS. WHITMAN: Yes, Your Honor.

THE COURT: -- that's fine.

Okay, folks. Can I now get appearances on the RACER Trust matter?

MR. KEHNE: Good morning, Your Honor. I'm Jeff Kehne, admitted pro hoc here representing RACER Trust.

THE COURT: Okay. Good morning, Mr. Kehne. I know Ms. Leary, of course.

MS. LEARY: Maureen Leary on behalf of the States of New York, New Jersey, Illinois, Indiana, Ohio, Missouri, Kansas, Michigan, Louisiana, Wisconsin, Commonwealth of Massachusetts, and the Saint Regis Mohawk Tribe.

THE COURT: Okay, thank you.

MR. HILL: Good morning, Your Honor. Michael Hill, General Counsel of the Trust and admitted pro hac vice in this

matter last November. Now one slight complication is that, in January, I did submit a declaration in response to the -- or, on February 3 in response to the -- in reply to the response, so in the event that Your Honor has questions of declarance or anyone has questions of declarance, it is possible that I may be called as a witness, so for that reason, I wanted to make sure that you're comfortable with my sitting at the table. Otherwise, I can sit back.

THE COURT: I'm not aware, at this point, that anybody is challenging the credibility of any of the witnesses in the sense of suggesting to me that anybody was lying, so the usual concerns about people commenting on their credibility would not appear to be the case. I certainly want to hear you if you want to be heard, Mr. Hill. I'm going to give others a reservation of rights on that issue, but frankly, I don't see an issue right now.

MR. HILL: Thank you, Your Honor.

THE COURT: Okay.

MR. BERZ: Good morning, Your Honor. David Berz, Motors Liquidation DIP Lender Trust. I'm here along with with my colleagues Ralph Miller and Sunny Thompson --

THE COURT: Okay.

MR. BERZ: -- and Mr. Miller will be making a presentation on behalf of the DIP Lender Trust today.

THE COURT: All right. Thank you.

MR. MILLER: Good morning, Your Honor. I am Ralph Miller from Weil Gotshal.

THE COURT: I'm not sure if you heard me, Mr. Miller. I wanted to get appearances from everybody, and before I hear anything of substance, I have a number of preliminary remarks --

MR. MILLER: I understand, Your Honor.

THE COURT: -- I want to make.

MR. MILLER: I just wanted to identify myself on the record for you, Your Honor, if I may.

THE COURT: Oh, okay. When Mr. Berz pointed to you, I got that message.

MR. EICHEL: Your Honor, Steve Eichel, Crowell Moring, on behalf of the RACER Trust.

THE COURT: A little slower, please.

MR. EICHEL: I'm sorry, Your Honor. Steven Eichel with Crowell Moring on behalf of the RACER Trust. Mr. Kehne will be arguing the motion today, but I wanted to just, you know, make my notice.

THE COURT: Okay, Mr. Eichel. Who did you say would be making the argument?

MR. EICHEL: Mr. Kehne.

THE COURT: Oh, Mr. Kehne. Okay.

MR. JONES: And good morning, Your Honor. David Jones from the U.S. Attorney's Office, Southern District of New

York, for the United States.

THE COURT: All right. You're representing the United States kind of as a big bundle without slicing and dicing in that between the Treasury interest and the EPA interest or any other?

MR. JONES: Collectively, the United States, Your Honor, and I will say active -- we've been actively coordinating between Treasury and EPA, so specifically both of those agencies.

THE COURT: Okay.

MR. JONES: Thank you.

THE COURT: All right. Have I now heard from everybody? All right.

All right, folks. I have, after all of the reading of the materials that have been submitted to me today, I don't see material disputed issues of fact, and as a result, unless somebody wants to change his or her view, as I understood it before today, I don't see the need for a cross examination, and I don't understand anybody to have asked for the ability to cross examine. Accordingly, I'm going to consider statements made in declarations to have been truthful to the best of the declarant's memory, although it's at least arguable that documents that are in the record should trump people's memories as to things that happened, and I consider the documents to be the best evidence of what they said, although that's not the

same thing, of course, as taking documents as true for the truth of the matter asserted as we would do in part of any hearsay analysis.

Now, based on that, I have a bunch of tentatives California-style, and your job on both sides -- because, as you're going to hear, I'm less than agreement in full with either side -- is to find that the original settlement agreement and the contractual obligations as embodied in the Trust were breached by the delivery of the TIPS in lieu of green money of the United States cash, but that the breach was waived that there are no damages and that the RACER Trust failed to mitigate its damages. I will, of course, want and frankly expect your best views as to why I'm wrong in those respects, but I think that the undisputed facts are pretty clear in terms of what I have before me.

I do have a couple of questions. Don't rule out the possibility that, with all of the stuff that was submitted to me, I missed stuff. One is I would like to know if the settlement agreement that was entered into back in 2010 -- I'm thinking approximately October 2010; I'll have to check my notes for the exact date -- has an integration clause. I want to confirm my understanding that that agreement does not say in baby talk anything about the currency with which the contribution would be made, but does use the words "payment" and put a dollar sign before the amount of dollars that are to

go into the RACER Trust. I want to get my arms around the entirety of the statements that were made in the disclosure statement. I have noticed a statement on Page 84 of the disclosure statement that says, "Such transfer shall include the transfer of Cash," with a capital C, "in the amount of approximately $641,000,000," again, that being on Page 84. Then, it says on Page 85, "The Environmental Response Trust Administrative Trustee may invest Cash," with a capital C, "including any earnings thereon or proceeds there from as would be permitted by 345 of the code and the earlier agreement." And then I saw a reference in the briefs to a Footnote 6, but I had trouble finding that Footnote 6 in the underlying documents, which, as best I recall from my prep, said or implied that the funding would be with a combination of cash and marketable securities, which is obviously somewhat inconsistent with what I just read, or arguably so, or one or the other didn't embody the entire picture.

But I see the disclosure statement as being relative to waiver rather than changing the agreement; as telling the parties who are going to be the beneficiaries of the RACER Trust -- the ultimate beneficiaries, not it's technical beneficiary -- it's practical beneficiaries, which I see is the EPA and the States and the Tribe -- as telling them what was coming down, and in essence, raising a duty to speak up if they didn't like what was coming down. And then I want to know

whether the Trust -- the RACER Trust or the States or the Tribe or, for that matter, the EPA disputes what I would be inclined to believe that Mr. Hill, Mr. Laws, and Mr. Hamilton were agents of the Trust and of the states and of the other governmental agencies, and that their knowledge and actions counts for all of the various what I'll call practical beneficiaries of the Trust. If there are reasons, Ms. Leary or any of the other people, why you think I -- that isn't the case and that the states can disclaim the actions of these folks, I'd like your help in that regard.

Now, other areas for which I would like help, aside from whatever folks -- you folks are going to be saying as part of your ordinary presentation. I want to know if I understood it correctly that either Motors Liquidation or Treasury or somebody said to the RACER Trust, fine; you want to give us back all the TIPS and we'll give you the original amount of money in green money, and that the RACER Trust turned that down. If that is the case, it seems to me to be relevant to mitigation of damages. I also am inclined to conclude, unless you guys can show me that I'm wrong, that if green money had been delivered on the original day, it would be worth the exact same amount now and would be the exact same amount over the course of the duration of the Trust, and while it could draw interest -- and I imagine it wouldn't draw a lot of interest, but it would draw interest -- but it's also my understanding

that the TIPS drew interest, and that the difference between the interest that could be earned on green money and the interest that could be earned on TIPS wouldn't be that great, and certainly wouldn't be $13 million bucks. And if it were only the difference between the interest that could have been earned on green money and the interest that was earned on the TIPS, you could have settled this in eight seconds.

I don't want to take any more time with preliminary questions. I do have reason to believe I'll be interrupting you a zillion times, but at this point, I'll hear first from the RACER Trust. Will that be Mr. Kehne?

MR. KEHNE: That's correct, Your Honor.

THE COURT: Come on up, please.

MR. KEHNE: Your Honor, I just have one preliminary matter. I've spoken with David Jones for the United States about the United States' position and clarifying that for the Court. There's been some confusion about the United States' position --

THE COURT: I'm going to need you to speak louder, Mr. Kehne --

MR. KEHNE: Pardon me.

THE COURT: -- and to pull the mic closer to you.

MR. KEHNE: There's been some confusion about the United States' position. There was an amended response brief from the MLC DIP Lender's Trust on that point, and there's

further confusion in the sur-reply brief concerning where the United States is in this matter. If that's of interest to the Court, I've offered Mr. Jones an opportunity to proceed my remarks so that I'm not put in a position of speaking for the United States, our beneficiary, as to where it is in the -- in this case.

THE COURT: All right, sure. You can give Mr. Jones a chance to be heard.

MR. JONES: Thank you, Your Honor. And again, good morning. David Jones from the U.S. Attorney's Office for the United States. And, Your Honor, as I noted previously, when giving appearances in this instance, our office represents specifically both the Department of the Treasury and the EPA.

As Your Honor knows, the United States has filed no papers in connection with this motion, and we wanted to make explicit on the record that the United States takes no position on and is neutral on this dispute. We think that it's important to make sure there's no misunderstanding as to whether the United States is taking any position. The United States is committed to fund the wind-down obligations of the estate, including both those being discharged by the RACER Trust and those being handled by the DIP Lender Trust, which is handling MLC's obligations as to funding the RACER Trust in this dispute. We make those commitments -- we are committed to carry out those obligations in accord with operative law

agreements and orders. The RACER Trust and the DIP Lender Trust obviously have squarely opposing views about what their obligations and entitlements are, and we have left it to them to negotiate or present their arguments for resolution by the Court, and we are neither endorsing nor opposing any -- either party's contentions or positions.

The only additional comment I wish to make is that it's very important to the United States -- and I think to all parties -- that this dispute be resolved promptly, and with the least possible administrative expense to either party.

Thank you.

THE COURT: All right. Thank you, Mr. Jones. Okay, Mr. Kehene. Back to you.

MR. KEHNE: And the only other preliminary matter I'd like to raise, Your Honor, is that I would like to reserve a few minutes for reply, if that's okay with you.

THE COURT: Yeah. You haven't appeared before me as much as some of the other people in this room. I always give permission to reply, and as long as the reply and potential sur-reply are limited to the new stuff that came out, I permit both.

MR. KEHNE: Thank you, Your Honor.

In light of Your Honor's view that the cash requirement was breached, I will skip past the terms of the documents except to note that the settlement agreement, Section

109, requires that any document submitted by the signatories to the Court be in compliance with that -- with the settlement agreement, and to the extent that the disclosure statement makes a reference in one place to the possibility of delivery of cash equivalences in addition to cash, we don't think that that, first of all, could trump the terms of the plan or the confirmation order or the Trust agreement, and would be inconsistent to read it as notice to the world that the securities were going to be delivered at all, especially notice to the settlement governments. That's the most critical issue.

THE COURT: Well, of course it doesn't change the underlying agreement, Mr. Kehne, and if I was unclear in my suggestion as to the significance of that, I think I need you to help me in light of what was really in my mind. The disclosure statement doesn't change the underlying deal, but it puts people on notice of what the counter party to the Trust is planning to do in its implementation of the deal, and it is relevant -- or at least arguably relevant -- to waiver. If waiver is the knowing relinquishment of a given right or of a legal right, and when the disclosure statement says, hey guys, here's what's coming down, subject to your right to be heard, it would seem to be enough to give -- meet the knowing requirement of that, so that's why I care what folks on the Trust side did to say, when the disclosure statement came down, hey, wait a minute; you can't confirm a plan giving us all of

these TIPS or other securities; you've got to give us green money. And I regard it as relevant to waiver, not to the underlying breach issue.

MR. KEHNE: I understand, Your Honor. With respect to the Trust's leadership, designated before the effective date, we're clearly aware that the debtors intended to transfer securities. That was clear from the establishment of the custodial accounts and from the discussions, and in fact, Mr. Hill's declaration recites that he had conversations with both Treasury and the debtors with respect to the question of whether securities would qualify as cash, and at the time -- this was in January 2011 -- he was assured that they had investigated it and that that was clear. Now, I think, at the time, what's important to focus on is that, for purposes of the Trust's obligation to enforce the terms of the Trust documents and its obligations to its beneficiary -- in this case in particular EPA, to assure full funding -- there was no harm threatened by -- merely by the intent to transfer securities. If the securities had been properly valued on the effective date, there may have been a formal breach and there may have been nominal damages, but there would not have been a harm to the Trust or the parties who settled their claims in response -- in return for full funding of the Trust.

The difficult arose -- the only real meat of this dispute came about because it wasn't just a transfer of

securities at net book value -- the debtors' accounting value of those securities -- rather than the cash equivalent value, the market value on the date of the transfer. That's the only reason why we're here.

THE COURT: Yes, sir. Exactly, and Mr. Kehne, I've tried to exercise self control not to interrupt you. I was going to give you kind of like a Marv Albert yes, if you're a New York sports fan, but the problem is that you're contractual entitlement ain't to delivery of securities using a particular evaluation method, specifically the market quotation method that you favor. It's your contractual entitlement is to the delivery of cash, and what you're saying in substance is that if they had valued it using a means that you consider appropriate, you would have shrugged your shoulders and said, okay, it's all right that you didn't give us cash, but that isn't what the contract says. The contract, at least to the extent that I find it breached -- and I know your opponents haven't heard, been heard on this, but, you know, I read the papers and the agreement, settlement agreement, and its relevant part -- your entitlement is to cash. It's not to securities valued by any particular method, or am I wrong in that regard?

MR. KEHNE: Your Honor, I think, as with any party to a contract or a consent order, if we had come running to the Court based on a disclosure that there was an indication one

document among five or six different documents that suggested that they intended to transfer securities in lieu of cash, and we had come in before there was any indication that there was damages -- that there were damages associated with that transfer of securities, I think we would have been uprated for wasting the Court's time. It would not have been a sensible expenditure of trust resources or the Court's time to come in and say, you need to sort out whether securities are an adequate substitute for cash before we know what those securities were worth. Those securities -- the notice to the Trust of what those securitise were actually worth, the cash equivalent value -- in other words, if -- what they -- what we would have received if they had sold them and given us green cash on that date, the first notice of what the Trust had of that was when the bank statement from U.S. Bank came out with evaluations in mid-May.

THE COURT: Mr. Kehne, you're right, of course, that when people come yelling into my court with various grievances, I get cranky, but there's a middle course, which is calling up your opponent in advance and saying, we've got a problem here, guys; we've got to resolve it, and either getting your counterparty to agree, or -- and I've used this expression so much it's as cliché in this room -- agreeing to disagree, and then, if it's important enough, you tee it up for a judicial determination. It isn't an either or that you stay silent on

the one hand or get the judge mad for raising an issue before him on the other.

MR. KEHNE: Well, I think, Your Honor, that the Trust did take prudent steps in exactly the direction that you're suggesting in Mr. Hill's contacts with both MLC and the debtors -- excuse me, both the debtors and the Treasury in advance of the effective date when it became clear that they intended to transfer securities. The question was raised, it looks like the documents require cash; have you run the traps on whether cash includes U.S. Treasuries? And the answer came back yes. There was, essentially, an agreement -- a position on the part of our counterparties that these were cash, and a position on our part -- on RACER's part, we're not sure about that, but we don't know that there's any harm to seek a resolution of, at this point.

THE COURT: Continue, please.

MR. KEHNE: Well, I think it would be helpful for me to go through a little bit more of the chronology from the period of the bank statement onward so that you can appreciate why it is that we're insisting that RACER didn't waive any objections. And I think it's also important to keep in mind that this is a multilateral dispute; that the States and the Tribe also have rights to enforce here, and I don't see how they are bound by a mistake that the Trust made, even though I want to insist that the Trust didn't make any mistakes and did

behave prudently with respect to this issue.

So, in May, the Trust received the U.S. Bank statement. Don't forget that this was the period of time when the Trust was first becoming effective, staffing up, learning all the ropes of the remediation, the property marketing, getting all the personnel maters in place, the Trust had essentially no arms and legs prior to the effective date, and it was taking over a large operation on the fly, but --

THE COURT: Pause please, Mr. Kehne. Your opponent contends that at least two of your folks -- I think it was Mr. Hill and Mister -- bear with me -- I'll try to come up with the other name -- were hired, if you will, or designated in September of 2010. Is that a disputed fact?

MR. KEHNE: No, that's correct. Mr. Laws and Mr. Hill had been chosen as --

THE COURT: Okay. Mr. Laws is the name I was groping for --

MR. KEHNE: That's correct.

THE COURT: -- and if Mr. Laws is in the courtroom, I apologize to him. Okay, go on.

MR. KEHNE: But their role -- they were the designed managers of the Trust for the period when and if the Trust took affect, but they had no employees, they had a limited kind of contingent budget -- contingent on approval of the plan -- to spend on legal advice during this time, and they had all the

issues that you're familiar with associated with the drafting, review, and approval of the settlement agreement, the Trust agreement, and the plan -- and the relevant pieces of the plan, as well as lining up high level employees and clean up managers to take over the work of the Trust on the effective date. But, never the less, in mid-May when the Trust received the bank statement and saw that U.S. Bank's cash equivalent values -- the fair market value on the effective date -- were $13.5 million lower than the claim values on the flow of funds summary that they received from the debtors. The Trust investigated, ran the traps internally, reviewed the issues, checked -- talked with the CFO, and went to Treasury, an important arm of our beneficiary, as well as -- on June 17, so there's very little time that passed between actual notice of a claim that could potentially lead to damages and our raising the issue with our beneficiary.

And I think it -- I think it's important to pause on the prudent -- why it was prudent to raise it with the beneficiary and not with the debtors, because we are, after all, our Trust. Our first obligation is to abide by and enforce the written terms of the Trust's documents, and our second obligation, consistent with those legal requirements, is to advance the interest of our beneficiary as our beneficiary articulates them, so it was entirely appropriate for the Trust to go to the beneficiary and say, guys, we see a problem here;

we see a gap that we're going to have to explain to the estates and the Tribe, if it stays, between what they bargained for -- what they got in those remediation and administrative accounts to provide for the cleanup that they settled for in the bankruptcy and what we received, and what we received was not -- it was neither cash, on the effective date in the $625 million amount required, nor was it the equivalent of cash, because if we had sold it on that date, we would be down $13 and a half million. That was raised -- on June 17, there's an email to Treasury from Mr. Laws on that date, and it was -- and there were discussions that followed from that.

So the -- I think it's clear that the Trust took reasonable efforts to make sure that this didn't just slide past. One of the things that was motivating that, frankly, was the Trust was aware and our CFO was aware that we were going to have an audited financial statement, and the audited financial statement, which was -- was going to need to declare to all the Tribe -- to the Tribe and all the States what was in their accounts, and if we had settled for the fair -- the net book values, which were lower than the fair market value, our outside auditors would insist on mark to market on the effective date, and we were going to show a $13.5 million gap between what we bargained for and what we received.

THE COURT: Go on, please.

MR. KEHNE: Well, Your Honor, I think that -- I

mean, that is the core of my response on the waiver issue, and I'm happy to answer any further questions that you have on that matter. I'd like to touch next on mitigation of damages question, if that suits you.

THE COURT: All right. If I wasn't clear in the tentative, I have double barreled concerns, both with respect to whether you were damaged at all, and second, based on the mitigation of damages you just mentioned. Before you're done, be sure to deal with both.

MR. KEHNE: Okay.

Well, perhaps as a logical matter, it makes more sense to go first on the question of whether we were damages, and I begin there with the terms of the Trust agreement and the plan that refer to enforcement under New York Law, and I think that's supported by Paragraph 56 of the response brief of the MLC DIP Lender's Trust, which says New York Law governs. I want to hesitate on that point for a moment, though, because I don't think New York Law is the entire issue here, because this is, in fact, a court order. I don't think that, given the documents, that it's proper to give less in the way of compensatory damage than New York would provide, but I certainly think that this Court reserves its authority to enforce its own order and go beyond those compensatory damages to vindicate this authority or because it finds that those damages are inadequate.

THE COURT: I saw that contention in your brief, and I'm not inclined to quarrel with the notion that judges, when they see their orders have been violated, have powers that may not be constrained by the limits of the applicable law, but -- I can't speak for other judges, but my personal jurisprudence is that, when I think that my order has been flouted and/or a litigant before me acted with malice or to be mean or to be overreaching, I'd consider invoking the principal you discussed, but I would normally not be of a view to be heavy handed in the use of my judicial power if I thought that there was a good faith disagreement between people as to what was required, or if, as could be argued here, no good deed goes unpunished. Do you think I'm being overly conservative in the exercise of my judicial power?

MR. KEHNE: No, I do not quarrel with that approach, Your Honor, and in this case. We think the New York law is perfectly adequate to raise such purposes here, and the reason why we think New York law is perfectly adequate for the compensatory remedy we seek is the New York law has a very strong principal that you assess damages at the time of breach. That rule is encapsulated nicely in the Kruss case and in the Merrill Lynch case, both Second Circuit cases. It's also set out in the New York cases of Aaronic and Simon, and the point there is that when there's a breach of an obligation -- a contractual obligation or, in this case, a consent order that's

contractual in form or partially contractual in form, that the remedy owed to the party that suffers the breach should not depend on the timing of when the action's brought. You shouldn't -- the New York courts have wisely dictated a rule that you shouldn't encourage gaming of the timing of the action to remedy the breach by allowing asset value fluctuation post-breach to affect what the breached party's entitled to, or whether the breached party's entitled to a remedy at all.

And, in this case, if you assess damages at the time of the breach, the damages from the breach of the obligation to provide cash are the difference between the net book values claimed by debtors and the fair market value that existed on the effective date, and that's $13.5 million.

THE COURT: Have you assumed a fact that is still on debate between you and your opponent, which is that that is how the TIPS are valued as compared and contrasted to evaluation that's premised on their being held to their various maturities?

MR. KEHNE: Well, Your Honor, I think -- there are clearly different ways of valuing securities, and one of the things I want to pause on here, because I think it's important, is that these -- although these are referred to TIPS in MLC DIP Lender's brief, in fact, only about 55 percent of the portfolio that was transferred on the effective date was in the form of TIPS. There was quite a large body of non-tip treasury

securities that were mostly shorter term, although there were some out to 2015 and 2016 zero coupon bonds. Those were not inflation protected, and those were also transferred at net book value as opposed to fair market value.

THE COURT: Help me on this, Mr. Keahne. I assume, from what you just said, that your guys got a bundle of TIPS -- if I heard you right -- short-term treasuries. I'm not clear on whether you also said longer term but not inflation-protected treasuries.

MR. KEAHNE: That's right. They were zero coupon treasuries called strips. If you look at the October 21 U.S. Bank letter that's attached to Mr. Hamilton's declaration, they will be identified as strips. The inflation protected securities will be identified as IP, inflation protected.

THE COURT: Okay. And was there a fourth component of old fashioned green money?

MR. KEAHNE: There was old fashioned green money in the amount of roughly $49 million.

THE COURT: Okay.

MR. KEAHNE: So the green money was intended as sort of make-up, the catch-up between the value of the securities and the value -- and the $625 million that they were obligated to transfer. The question we have is whether the make-up was $13.5 million short because they claimed accounting value rather than cash equivalent value, the fair market value on

that date.

THE COURT: Let me interrupt you again, please. I don't know if it's fair for me to take judicial notice of this or not and you can weigh in on this and so can your opponent. It's my understanding that the value of debt securities as traded on the market can go up or down with prevailing interest rates, although the extent to which they do go up or down depends in part -- and maybe material part -- by how short-term they are, and that the longer term they are, the more they tend to move up or down. Do you think it's okay for me to make that assumption?

MR. KEAHNE: To the limits of my knowledge of U.S. Treasuries and securities markets in general, that's correct. There may be unusual circumstances I'm not aware of in which there's more flocculation in the value of shorter term securities with a given swing in interest rates.

THE COURT: Is it also your understanding that, assuming there's no credit default or, I mean, failure to pay at the end, the debt instruments are paid off at their face value when they mature?

MR. KEAHNE: Aside from the risk of default on the part of the, in this case, the U.S. Treasury, which was, in fact, an issue in the financing in this case, although not directly relevant here, but there was a period in July, if you'll recall, when it wasn't clear whether the debt ceiling

was going to be raised, and there were concerns about which U.S.-backed securities the Trust ought to be in when the initial securities matured, but that's correct.

THE COURT: Okay, but putting aside quibbling between Republicans and Democrats, I take it nobody thought that the U.S. Government wasn't good for the money.

MR. KEAHNE: I guess I would say nobody thought that there was a better option; that there was a more secure option than the U.S. Government. The --

THE COURT: Continue, please.

MR. KEAHNE: So, we're -- I'm trying to get to the bottom of the question of your question of why there were damages, and we -- I'm pointing to the very strong New York law rule that you assess damages in an action like this as of the date of the breach, and one -- an additional insight, I think, that supports the wisdom of New York's approach here is, if those securities had swung in the opposite direction, if they had become less valuable rather than more valuable since the effective date, I don't think it would have taken you long to dismiss an action by RACER that we should be getting additional support because, in fact, the Treasuries we received took a bad bounce, and now there's a -- they have a lower fair market value than they did on the effective date. It happens that they have a higher fair market than they did on the effective date, but under New York law and under, I think, sound -- a

sound approach to damages assessment, that doesn't matter. They can't be heard to come in and say, but, they're worth more today, you're lucky, any more than we could be heard to say, it doesn't matter that we were fine on the effective date, now we're unlucky, and I think that's part of the thinking and the analysis that underlies this very strong principal in New York damages law that you assess the damages at the time of the breach.

Now, there are a number of cases that are cited in MLC DIP Lender's Trust briefs referring to New York courts' aversion to conferring windfalls. Those typically come up in the case -- in circumstances of restitution or reformulation. There -- I don't believe there's -- I have not seen a single case, Your honor, in which New York courts said, not withstanding our general principal that you assess the breach -- the damages at the time of the breach, we've decided that the asset swing since the breach has benefitted the parties who suffered the breach, and therefore it would be a windfall to award them the damages assessed at the time of the breach. I just don't think there's a case out there that says that, and there are many cases that say the opposite.

Now, we don't think it's the proper approach, but even if, as a matter -- as a thought experiment the Court were inclined to say, what really would have happened in the real world if RACER had received the cash? What would RACER had

done and would they be harmed today in the way that they're asserting before me if they'd received actual green money for the full amount? Or, rather, would they be harmed today if they'd accepted cash in the lesser amount?, and the answer is yes. If NLC -- if the debtors had cashed out on the effective date -- suppose the debtors had said, we see a real issue here, Your Honor -- we see a real issue here, Racer, and States and settling governments; we see a real issue about complying with this requirement that you get cash, and we've set up this very thoughtful, very expensive, in transaction cost terms, approach to matching liabilities and future revenues from these securities. We see a problem because we're supposed to deliver cash and we don't want to be on the wrong side of that requirement, so we need to cash out and then have you cash back in, get back in right away, if you want to have these securities. RACER was aware that Treasury had vetted this approach. Treasury had, in fact, supported a change in the DIP Lender agreement that allowed the debtors to go into longer term instruments in order to get into these securities. If they'd played it out that way, if they had said, we want to comply with a letter of the cash requirements in the governing documents, they would have incurred a very small transaction costs to get out, we would have incurred a very small transaction cost to get back in to the portfolio of securities that we knew Treasury had approved, and that we knew had been

the subject of considerable analysis by J.P. Morgan, by Mesirow, by the experts among the debtors, there was no reason for the trust not to duplicate what had already been done to match future costs -- future expected costs and maturities of the securities in a way that partially had defeased inflation risks.

And, in fact, that's entirely consistent with what the RACER Trust has done. The transaction costs of getting out of these securities are very small in percentage terms when you're talking about the size of the transactions we're talking about, and RACER has remained with that portfolio, so I think, if we had received -- if they had cashed out and we had cashed back in, we would be $13.5 million behind the position that we were supposed to be in under the documents, so again, we don't think that that's the proper analysis, but we think that the only fact -- the only competent facts in the record are that that's exactly what would have happened if that were the way you were to proceed to analyze the damages question.

THE COURT: Continue, please.

MR. KEHNE: I think that leads right in to the mitigation of damages issue that you raised, and the question, as I understood it, Your Honor, from your tentative was shouldn't RACER have sold when they became aware of this problem in light of the swing in the asset value, in light of the increase in the fair market value of its securities?

Shouldn't they have sold and gotten the cash that they wanted, and in fact, had more on hand?

And I think the answer to the mitigation of damages -- well, there's a couple parts to it, but the first goes right back to the New York principal that you assess damages at the time of the breach. Suggesting that we mitigate our damages by taking advantage of the upswing the asset value is just another way of saying repudiate to the assess the damages at the time of the breach principal, because the principal stands for, those asset values are irrelevant. What the Courts focus on is, was the party damaged and to what amount on the date of the breach? And the second part of the answer on mitigation of damages is in a line with the hypothetical that I just walked through, which is to say Scott Hamilton's declaration concerning RACER Trust's investment approach and deference to Treasury's approval of the prior securities portfolio, as well as RACER's revealed preference, in fact -- that is, what its actually done shows that it wanted to be in those securities, so if we sold out and got the cash, we would then have to buy -- to get the same benefits that we have committed to in terms of inflation protection, matching expected expenditures to maturities of securities, if we had done that, we would have spent the same money that we received when we cashed out to get back in to what was regarded as the prudent strategy for managing Trust's investments and expenses over the course --

over the next 20 years.

THE COURT: You talk, Mr. Kehne, about the prudent strategy, which, implicit in that, is having a basket of securities -- I gather some TIPS, perhaps alternatives, but that wasn't what the practical beneficiaries had negotiated for. They had negotiated for green money. If they thought that having a bundle or a basket of the character that you're describing was the prudent thing to do, they didn't bargain for that. That isn't what the agreement that you're trying to enforce said.

MR. KEHNE: But the bargain also included discretion for the Trust. Carefully constrained discretion in terms of the limitations on the types of investments that the Trust can enter into, but the Trust also has the power to choose a prudent mix of secure investments to ensure that the money grows as much as possible consistent with our obligation to make sure that we're not running market risks of having to sell out in a down market, and that's where Treasury's approval of the laddered TIP and non-TIP securities portfolio comes in, because, again, the Trust had that authority on the effective date to cash out, and if it had received cash, it had the authority to buy back in, and what the Trust's actions show is that it was committed to that strategy and it had a convenient pre-approved, carefully worked out approach and would have done the same thing, so we -- the parties did bargain for cash, but

cash wasn't inconsistent with taking a sensible approach to managing that cash beginning on the effective date, and that's what the Trust has done and that's what the Trust would have done if it had been green money. You could imagine, Your Honor, a scenario again in which the debtors had come to the Trust and said -- and to the settling governments and said, we want to comply, but we don't want you to be out of the market -- out of the securities market for any length of time because we think that you'd run a risk if you were sitting in cash, and you want the full benefit of this carefully worked out portfolio of securities, so let's work out a way where we can cash out in this liquid market on the effective date, and 15 minutes later, you can cash back in. The parties would have been down by very small transaction costs. They would have complied with the requirements -- the cash payment requirement.

I think that's, essentially, the logic of the Trust's position, returning to the first point. That it didn't make sense to ring an alarm bell prior to knowing how those securities were valued. Knowing that, in fact, they hadn't been valued at their cash value.

THE COURT: Go on, please.

MR. KEHNE: Well, Your Honor, I think that touches on the points I would like to make with respect to damages and waiver. I would like to reserve objections to some of the statements in the sir reply affidavit. We don't think they're

relevant, but if Your Honor does, we're happy to proceed and resolve those today. Specifically, we think that, with respect to the $108,000 off-set that --

THE COURT: The true-up that took place shortly after the original?

MR. KEHNE: That's correct. We think that Mr. Rosenthal's statements concerning his understanding of how debtors and his colleagues at MLC would have worked this out and that the reservation of RACER's rights in the schedule that accompanied the offset payment -- or the payment subject to the offset really wasn't an adequate way -- didn't reflect the way those parties would have proceeded, we think that that can't be credited over Mr. Hamilton's specific recollection of conversations that he was a part of with Mr. Selzer (phonetic), who's -- as I understand, has left MLC, but it's also -- Mr. Hamilton's statements are also consistent with the documentary record and with the undisputed record concerning contemporaneous communications between RACER, including Mr. Hamilton, and Treasury concerning the large issue.

In other words, the true-up is presented by MLC DIP Lenders Trust as, this has got to be the end of the story, but at the -- but Mr. Hamilton's uncontradicted declaration is that the issue was reserved specifically with Mr. Selzer. The documents associated with the true-up -- of the partial true-up are consistent with that, and Mr. Hamilton's participation in

conversations at that same time with Treasury about the much larger net book value versus fair market value dispute also make it clear that there was no intent on the part of RACER to resolve that larger issue in a communication between people working out $1 million or $2 million in miscellaneous adjustments in preparation for the final adjustment, which didn't appear until December.

THE COURT: I didn't understand them to be arguing an accord and satisfaction, or if they were arguing that, it didn't make a very persuasive argument for such a conclusion. But what I did take from that is that, at the time of the $108,000 true-up, your guys knew that they were getting paid in TIPS, at least in part --you clarified that -- and not in green money. I take it there is not a dispute of fact that, as of the time of the true-up, your guys knew that they were getting paid in securities and not in green money?

MR. KEHNE: Your Honor, Yes. In -- the offset was part of a conversation about various payments that had -- principally payments that had gone to the debtors that should have gone to RACER, and this was post-effective date in June 2011, so by that time, RACER had already received the bank statement and appreciated both that it had received Treasury securities into its custodial account, which RACER knew in advance of the effective date. But also, more importantly, that's when RACER understood that the value assigned to those

securities by the debtors in determining the amount of the cash catch-up payment was not the cash equivalent value; was not the fair market value, the quoted value on the date of the effective date. Instead, it was the accounting value that had been -- the debtors had assigned to that.

THE COURT: Okay. Continue, please.

MR. KEHNE: There's one more point that I'd like to make with respect to -- there's on more point I'd like to make with respect to the notice question that I think is behind some of your questions, Your Honor, and that goes to the monthly operating reports. I mean, I didn't hear that as part of your tentative, but I want to touch on what was in those monthly operating reports and what significant they had, just to dispel any notions that they were notice to RACE or the world that the trust -- I mean, that the debtors intended to transfer these securities at something other than the cash value on the effective date.

The monthly operating reports included a large disclaimer that they were not intended to comply with GAP principals, and I understand that that's typical in bankruptcy proceedings. They also reported the amortized cost basises, which is essentially the fair market -- I mean, excuse me, the net book value. It may be useful to get -- put a little bit of detail in here. The net book value we refer to in our papers has two components. One is the amortized cost book value of

the security as carried on the books of the debtors, and the other is accrued but unpaid interest, and my understanding is it's done this way because, when people look at the underlying value of the security, they want to see a trend line that reflects movement in the bond market, interest rate swings, appetite for risk; the factors that affect the value of bonds, or Treasury securities, and not at where you are in the six month cycle of interest payments, because interest accrues and then is paid at six month intervals, so when you acquire a Treasury security that has a six month interest payment schedule and you buy at five months in, you're entitled to accrue -- you're going to be receiving accrued interest on the -- on that interest payment date.

THE COURT: Sure. What you said is so fundamental that I'll let your opponent be heard on whether or not I can take --

MR. KEHNE: Okay.

THE COURT: -- judicial notice of it, but anybody who's ever bought a corporate or treasury bond knows that.

MR. KEHNE: Okay.

THE COURT: I mean, that's what you take before you take Finance 101.

MR. KEHNE: Okay. Well, I'll move on then, Your Honor. I apologize.

THE COURT: Okay. No, I agree with that, but I'm

not quite clear on where you're headed with that.

MR. KEHNE: Well, okay. So, what I want to say -- what I want to rebut is the notion that the monthly operating reports, by setting out amortized cost values, provided notice that, on the effective date, those amortized cost values were going to be the basis for evaluation of the securities, and the central point is they also reported fair market value, and they reported the difference between fair market value and the amortized cost value. I don't think there's any notice in that document -- in any of those documents to RACER or the world that, prior to the effective date, MLC or the debtors were telling everyone, we intend to transfer -- we not only intend to substitute securities for cash, but we intend to value them at something other than the cash value.

There's been a lot of ink spilled in the papers on consistency with GAP, and whether, in fact, these monthly operating reports and the reporting on an amortized cost basis complied with GAP, and our fundamental answer to that is it's irrelevant to the issue of whether transfer of those securities on the effective date at something other than the cash value complied with the rules. Even if GAP, as MLC DIP Lenders Trust claims on behalf of debtors, even if GAP required debtors to report, for purposes of their books, in monthly reports on an amortized cost basis, and in fact, they did report exclusively on an amortized cost basis. They also gave the fair market

value, but even if that had been a compulsory evaluation requirement --

THE COURT: Under GAP and under FASB standards --

MR. KEHNE: Under FASB standards. FASB is not -- FASB does not purport to say and FASB trumps an agreement between parties as to the valuation of assets delivered under a contract or a consent order, so compliance with GAP in reporting amortized cost values prior to the effective date says nothing about notice, expectation, or the requirements of the consent order -- I mean, excuse me, the confirmation order, the plan, the settlement agreement, and Trust agreement.

Your Honor, I'd like to reserve the balance of any time I have to reply, unless you have further questions for me.

THE COURT: No. Thank you very much. You have a luxury that -- with me not being an Appeal Court, I let people talk until they have nothing useful left to say, so we're fine.

What I think I would like to do now, though, is to take less than a ten minute break but a little break and then to hear from Ms. Leary or anybody else who's allied with the Trust on what I just heard, so let's reconvene at five after 11 on the clock up there as far as soon thereafter as everybody can get back in.

We're in recess.

(Whereupon these a short recess was had.)

THE COURT: Ms. Leary, do you want to be heard next?

MS. LEARY: Yes, Your Honor, thank you. Maureen Leary on behalf of the states and the Saint Regis Mohawk Tribe.

Your Honor, I hate being in a position of convincing -- trying to convince you that you're wrong. It's just a bit unsavory, but, with all due respect, I think, particularly from an equitable standpoint, you are.

What this is about is a mistake, and the mistake wasn't the states' or the Trust's, the mistake was MLC's, and Treasury somehow got ensnared, and I believe -- just my own opinion -- that's why they're not standing before you taking a position. What was the mistake --

THE COURT: Do you think it might have to do with the fact that Mr. Jones has, under the grand umbrella of the United States Government as a client, two governmental entities that have at least arguably inconsistent positions, and that he might be an ethical lawyer?

MS. LEARY: I think that might be right. I don't envy him, but the question isn't what the U.S. did. The question is who should suffer or who should bare the risk that resulted from that mistake. What was the mistake? The mistake was that Motors Liquidation went out, unbeknownst to the states, unilaterally and said, I am going to buy securities to fund the Environmental Trust, even though at the time they bought them, I believe, the agreement was pretty much executed that -- it said cash, and the reason it said cash is because

the states were unwilling, at the market volatility at the time, to take anything less. They were willing to give the discretion only to someone who would be on their side of the table, not Motors Liquidation, but Motors Liquidation unilaterally went out and bought them, and remember the context, Your Honor. The original confirmation hearing was scheduled for December, so they were really trying to sort of get a jump, and they thought they maybe had 30 or 60 days before they had to actually have an effective date and give them over. What happened? The effective date wasn't until March 31, and in that period of time, the TIPS lost value. That's what happened, so this is just an after-the-fact justification of, okay, here's the TIPS that we bought for you way back when, even though they lost value and even though it's not the amount that the states or the Trust or anybody expected, so the question I have for the Court is, is it fair to impose those on the Trust or the states? Is it fair to say, oh, whoops, because they unilaterally decided to do this, to buy securities which you didn't want, you didn't intend, and that's not what the deal was, you're now going to bear the risk of loss that happened between October of 2010 and the effective date in March of 2011.

Now, the reason Mr. Kehne opened his remarks with a citation to -- well, I will call it a consent decree, is because Paragraph 109 says two things, very important. The

consent decree trumps anything else, anything else, period. It trumps the disclosure statement, which I know Your Honor has some concerns about, the cash equivalent language, it trumps the plan, it trumps -- with all due respect -- the confirmation order, even though it's incorporated in the confirmation order. That's a very important provision for the states, because what we didn't want was to be here later, fighting about just this very thing, so what does that mean if the consent decree trumps everything else? Well, what it means is the consent decree -- and I'm referring to two documents now, Your Honor; one is the settlement agreement and the other is the Trust agreement. Those two documents were actually approved in your confirmation order, so this is a Federal Court consent decree, these two documents that have particular requirements. You don't look outside of those. You don't look at the disclosure statement, you look nowhere else except those two. What do those two say? Well, what they say is cash, not cash equivalents, not, you can go out and buy securities and the Trust will bear the risk of loss if they go down in value. And, with all due respect to MLC, we would never have the guts to come before the Court if, all things considered, cash had been invested at the time of the effective date and the value went down. Would we be able to come back here and say, oh, give us more money MLC? We would not have, but by the same token, we cannot be asked to bear the risk that MLC, with Treasury's tacit or expressed

approval, took on in October of 2010. If they bought the TIPS, they were responsible for making sure the value of the TIPS was maintained, and if it wasn't maintained, they had to close that gap with the adequate amount of cash.

I want to talk for a minute about value, because I think this is really important. If, on the effective date, the Trust and the states and the U.S. had said, you know what, we don't really need this $641 million; we're going to do it ourselves, go sell the TIPS, what would the value on the effective date that a reasonable buyer, a reasonable investor would have paid? Would it have been this net book value? No. MLC would never have sold the net book value. They would have sold for what a reasonable purchaser would have given for those TIPS, and I think that's the analysis, not what happened after.

THE COURT: Forgive me, Ms. Leary. Am I missing something fairly material, or was the contemplation not that somebody, Emily LaTella-style would say never mind, but that the money would stay at the RACER Trust for the purpose of the environmental remediation for which you and the EPA so eloquently argued back before? You're talking about a total hypothetical of somebody saying never mind when the purpose for the whole arrangement was for the EPA and your guys to be using the money for which it was put into the Trust in the first place.

THE COURT: I -- you misunderstand me, Your Honor,

and I apologize. The reason I gave that example is to point out what the Court should look at in terms of the value on the effective date. That's New York law. You value a transfer of an asset on the effective date. Now, I know Your Honor has some concerns about whether we have a right to value it in one way or another. The fact of the matter is is that MLC does not have the right to value it in the way that they valued it. There's nothing in the consent decree that says $641 million at net book value. There's nothing there that says you can manipulate this by an accounting trick.

THE COURT: Well, of course you're right in that regard, but query whether the converse is also true. Since the contract provided for payment in green money of the United States, it likewise does not provide that the measurement of the value of the funding that goes into the Trust is on the day to day trading value of the securities as against the possibility that, instead of being held to maturity, they're dumped on the market long before the remediation has been completed.

MS. LEARY: Well, Your Honor, a couple of things.

I don't think anybody in this room knows whether the TIPS -- whether the Trust will have to liquidate anything before the maturity. I don't -- we don't, as we stand here, know the answer to that question. We hope not, but we don't know the answer to that question, and looking into the future,

as I think MLC would have the Court do, is kind of -- it's very difficult, because I don't think anybody has a crystal ball to define what will happen in the future, okay? I'm not exactly sure what you're asking me, but my view of the --

THE COURT: What I'm trying to say diplomatically, Ms. Leary, that's what's soft for the goose is soft for the gander, and there is a very good reason -- or at least you can tell me if it's not such a good reason -- why the contract doesn't talk about the method for valuation of the TIPS and the remainder of the governmental securities. It's because the contract doesn't talk about valuing those because the contract talks about funding it in green money of the United States.

MS. LEARY: Yes, and I think that that's the important piece, because, if it talks about funding it in green money, you never get to amortized, appreciated, net book value, or any of that. Cash says, to me, whatever the fair market value is. That's where I think the connection is. If, today --

THE COURT: No, forgive me. Cash says to me green money of the United States.

MS. LEARY: But, Your Honor, we can't go back and reinvent history. We are stuck with the mistake that MLC made that now is being hoisted upon the Trust and the states. We can't go back, but let me give you an example that I thought about.

I owe Company A, Apple Computer, money, and Apple Computer is one of the wealthiest, and over the period of time I owe them money -- let's say it's six months or a year -- their stock doubles, their, you know, credit ratings skyrocket, all this cash, and I say to them, you know what, I don't want to pay you money now because you're doing so well. Does that make sense? That's analogous, in my view, to MLC's position here. Oh, because these TIPS are ultimately, crystal ball, going to be worth this and you're going to have 641 million, ultimately, we don't owe you what we should have given you on the effective date.

So, I'm appealing to this Court's equity. The fact is, who should bare this risk of loss that MLC chose to take on in October -- September, October of 2010? Should that be the states and the Trust?

And I wanted to talk for a moment about, you know, whether the Trusts and the Trustee is our agent, et cetera. WE did not know -- and it's undisputed -- until the middle of November of 2011 that any of this had happened, including that this TIPS thing had happened. Now, MLC -- and I truly question how they phrase this in their opening response brief -- they claim that the DIP financing amendment, which I believe is Docket 6374, or, it's a September 2, 2010 notice -- they claim that this gave everybody, including the states, some kind of notice that this was going to be the deal, okay? Now, this was

before we signed -- we executed the agreement, so I can tell you right now, if I had known that this was going to be the deal, I wouldn't have signed the agreement. This says, simply, "the third amendment provides that the definition of cash equivalents under the DIP credit facility shall be modified to include securities issued by the United States Treasury that may have maturities of 15 years or less from the date of acquisition." There's nothing in here that says, we are going to use these securities for the purpose of funding the Trust instead of the cash that the agreement now says. Nothing says, we should know what this is about. So, in terms of some waiver by the states, I don't think that there's been any knowing relinquishment of any right, but again, we're after the fact. Can we go back? We cannot.

But the question for the Court is, what's fair to do now? If MLC had made the decision to acquire securities that lost value before they were transferred to the Trust, does the Trust get less value? Do the states get less value just because? Why would that be fair when we said, this amount in cash? It's just not fair, in my view.

The question of agency, Your Honor, I want to refer the Court again to the consent to create, and I believe it's Paragraphs -- it's Pages 25 to 49. It very, very specifically sets forth the very circumscribed, year-long, negotiated authority of the Trust. The Trustees do not have the authority

to accept less than the states' bargain for, and that's what this Court is -- and MLC is asking the states to do. The fact that, you know, we -- the securities may have increased in value or whatever is irrelevant to that fact.

There is -- a couple of things that I really have issues with in terms of this contractual analysis, and I understand why the Court wants to go there, but this is a Federal Court consent decree. This is your confirmation order. This isn't some commercial transaction between two, you know, commercial or industrial manufacturers or something. We're the government. We, in good faith, believed we were going to get a particular value as a result of this deal, and I can tell you, we don't -- we did not get that value, and that's the sort of puzzling part of this. If we didn't get the value, what good is a Federal Court consent decree and confirmation order that clearly spells out, cash in this value? Instead, there's been this level of manipulation with accounting terms that, in my view, are just frankly irrelevant.

And I want to go back for a moment to, you know, whether there's been some knowing relinquishment of a right. I don't think Treasury could have waived our rights either to the extent this Court may view that they did, somehow. I do not think that the Trust and the Trustees can waive the states' rights either. You asked about whether the Trustee is our agent. Again, I refer you to the consent decree, but if you

look at MLC's papers, they make this argument about continuity of ownership, and, you know, how this Trust was set up for the purpose of bailing them out of environmental liability. That's not the purpose of the Trust. The Trust was set up so that we would have a reasonably structured way to deal with literally hundreds of contaminated properties -- actually, it's 90-something contaminated properties across the country. This wasn't set up for LMC. This was up for us. This wasn't -- but, just looking at their papers, you'd think maybe the Trust -- the Trustee is their agent, because of this continuity of ownership. I don't believe that, but their argument taken to its logical conclusion in terms of your question, I don't know.

THE COURT: Well, I -- if the Trust were their agent, you wouldn't have the problem you have now.

MS. LEARY: Right.

THE COURT: I understand the problem to be that the Trust is acting for your benefit, that there were no independent provisions in either the consent decree or the settlement agreement of which I'm aware that gave the states the ability to act for the Trust directly, and that was the purpose of the Trust personnel, and if there was something I'm unaware of, you know, help me on that, Ms. Leary.

MS. LEARY: I don't think that there is any evidence before the Court in the consent decree that would support, you know, a fining of some agency, or a fining of waiver. I just

don't see it. If we find out in November of 2011, less than a month before we appeared before Your Honor on December 8, I don't think that there's evidence in the record to make that finding.

One thing that is also not before the Court in terms of an evidentiary basis is any approval the Treasury gave MLC in terms of how they were going to value the TIPS on the effective date. There's no evidence the Treasury said, oh, go ahead, value them at Netbook value so you can deal with this loss that you've sustained between the purchase of the TIPS and the present time.

Section 109 of the consent decree also has another provision I want to make Your Honor aware of, and that provision Mr. Kehne touched on, and it has to do with undertaking actions or submitting anything to this Court that are inconsistent with the consent decree, and this is fairly puzzling to me because just about everything you have before you that's been submitted by MLC, in my view, is inconsistent with the consent decree and its cash payment requirement. So, it's not -- their violation of this consent decree goes beyond just, you know, the TIPS versus cash issue. It has to do with, you know, a bigger problem here, which is, I think, not really standing behind a document that they signed and agreed to, and, you know, to me, the biggest problem I have is if the states have to sustain, you know, this risk of loss rather than MLC,

the way environmental remediation -- I've said this to Your Honor before -- it is very difficult to predict. This is a fund that, if I were to take bets among the states, nobody thinks this is going to be enough. The hope is that it would be more. Nobody thought when they signed this agreement -- and it says so, frankly, in the consent decree -- I don't have that paragraph number in front of me, but I believe it's somewhere near the end where the states say, you know, we don't agree that this is a good deal, but it's really the best deal we could get, and in the context of this case, it was. We believed it would work. But the way environmental remediation is, you always need more money, you never need less. And -- you know, most puzzling to me is that, if there is any money left over, it goes back to Treasury anyway, and so -- is this much ado about nothing? Why --

THE COURT: Ms. Leary, forgive me. I didn't want to interrupt you, but I think I've got to. You said environmental remediation is hard to predict and I understand that, but isn't the time to deal with that before you make the deal, before you enter into the settlement agreement?

MS. LEARY: We did.

THE COURT: Or, if you think that the settlement agreement that's in the offing isn't going to be good enough, than, you know, you come before me. I don't think I'm exactly hostile to environmental needs and concerns.

MS. LEARY: Your Honor, this was the best deal we could get. That's the bottom line, and we're okay with it, but nobody thinks that this is going to be enough money. Nobody thinks that. I just want to be clear about that. It's okay.

THE COURT: Okay, and you're saying that's relevant on this contractual interpretation issue and this --

MS. LEARY: Well, I think it's --

THE COURT: -- you know, contractual dispute how?

MS. LEARY: I think it's relevant to MLC's argument that says, oh, just wait; you'll have plenty of money, you'll have the 641 ultimately. What we need is what we bargained for, which was on the effective date getting a particular value. Now, the agreement says cash; we didn't get that, so the next question is, if we didn't get that, fine, the Trust had to get up and running, there was a big handoff, there was a big rush, what was the value of what they got? That's really the single question for this Court, and I submit that the value of what they got was not what the states bargained for, and the reason it wasn't was because of this concept of the TIPS losing value and after the fact justification on this netbook value, we'll value it this way and it'll look like we gave you what you were supposed to get. That's my view of what happened here. The question for the Court is this very straightforward one: on March 31, what was the value of those TIPS? And I submit that it should be some -- have some -- that decision be

informed by the requirement that we receive cash, that the Trust receive cash, and what that says to me is you valued the TIPS on that date based on their fair market value, not on some balance sheet value, which is what netbook value, by definition, is. It's how a company carries an asset on its own books. It has nothing to do with the value that a reasonable person would give to a security on the date of a transfer.

THE COURT: All right. Thank you.

MS. LEARY: Thank you.

THE COURT: Okay, Mr. Miller? Wait. Mr. Jones, are you rising to be heard on something beyond what you told me before, where I thought you weren't going to be heard other than to make disclaimers?

MR. JONES: I am, Your Honor, and I'll be more terse in my disclaimer but, again, repeat that this in no way alters our position of neutrality. However, Your Honor did ask questions at the outset specifically about whether beneficiaries -- excuse me, whether a Trustee is the agent of the beneficiary, and at the break, a colleague armed me with a little law on that question, which is actually of some programmatic importance to the government and, I think, may also just be helpful to the Court, so I wanted to provide that now in case it's helpful.

And the answer, according to research I've been provided -- and I can provide some cites -- is no, that is a

technical common-law matter. A Trust does not act as the agent of the beneficiary of the Trust.

THE COURT: That's why I used the word effective each time.

MR. JONES: Right, and Your Honor I --

THE COURT: If the Trust wasn't put into place to advance the interests -- and I hate to make you take positions, but I'd still like to have my questions answered -- if the Trust wasn't put into place to advance the interests of the EPA and the states and the Tribe, are you suggesting to me that nobody was?

MR. JONES: Your Honor, I was all ready to say, Your Honor, I absolutely agree with the Court that the RACER Trust was created to advance the interests of -- certainly the broad public interest in remediation of contaminated sights and, specifically, EPA's interests and the relevant states and the Tribes' interests, so I have no quibble with that at all, and I recognize Your Honor worded your initial observations or tentatives in a way that may be consistent with the law that I'm point out, but particularly because this -- we deal with Trusts a lot, we have sensitivity to what exactly potential liabilities we're taking on, and we want to disavow --

THE COURT: Well, I understand that.

MR. JONES: Yeah.

THE COURT: But I kind of have a sensitivity to

trying to get the right result in this controversy.

MR. JONES: Right, and this actually is not oriented, really, so much, as I say, at advocating a result as just it -- making sure that there's not a false premise at foot; that it's a technical matter and, formally speaking, RACER or its Trustees are acting as an agent of the EPA. If it would be helpful, I can provide a few cites I've been given. If not, I will sit down.

THE COURT: Early on in your first remarks, you talked about the importance of trying to get this resolved expeditiously and quickly. I'm going to accept, for the purposes of this argument, subject to your opponent's or anybody's rights to be heard -- I don't know who's your opponent, who's your ally; I don't know who your client is -- at least with respect to any particular point, but I'm going to try to give you guys some help before the sun sets tonight. I don't -- and the bottom line is, therefore, you don't need to give me supplemental briefing. I'm going to assume that you were truthful and candid to me. You always have been, I'm sure you always will be.

MR. JONES: Oh, thank you, Your Honor. No, all I -- I'm sitting here looking at a cite to a Supreme Court decision wondering if it would be helpful to the Court to hear it or not. If -- that's really all I was contemplating.

THE COURT: If you want to read me the words of what

the Supreme Court said, I'll hear them. I know of at least one Supreme Court decision that said we're deciding a very narrow issue, an issue that's important to the authority of Bankruptcy Judges, and nobody takes those words alone as meaning a whole lot, but if you want to tell me those words that you want me to be aware of, I'll hear them.

MR. JONES: I'll couple it with a really important Court, Your Honor: this Court, Judge Glenn decision of last year in the Dryer matter, so -- both Judge Glenn in the Dryer case and the Supreme Court in a case called Chauffeurs, Teamsters, and Helpers stated that -- just what I just said, that a Trustee does not serve as an agent of the beneficiary, and the specific cites are 494 U.S. 558 at 585 to 586, that's from 1990, and the Dryer decision is 452 B.R. 391 at 421, Note 25.

So, I'd just offer those to the extent they're helpful to the Court.

THE COURT: Okay.

MR. JONES: Thank you.

THE COURT: Thank you. All right, Mr. Miller. Your turn finally.

MR. MILLER: May it please the Court, this is Ralph Miller, again, from Weil Gotshal.

Your Honor, I'm going to try to address your questions first, if I might, and the first question that I show

that you asked specifically was about an integration clause in the settlement agreement. I don't think we find what we would consider to be a traditional integration clause. Paragraph 12 says that, "the debtor shall incorporate the settlement agreement into the plan by reference, and approval of this settlement agreement shall be a condition precedent to confirmation of the plan." It states, "the debtor shall not file a plan or amend the plan in a manner inconsistent with the terms and provisions of the settlement agreement, take other action in the bankruptcy case that's inconsistent with the terms and provisions of the settlement agreement, or propose terms for any order confirming the plan that are inconsistent." It says, "the government shall not oppose any term or provision of the plan or an order confirming the plan that is addressed by and is consistent with this settlement agreement," and then, "the parties reserve all other rights or defenses they may have with respect to the plan. In the event of any inconsistency between the plan, in the order confirming the plan and this settlement agreement, the terms of the settlement agreement shall control." I will note that our belief is that the settlement agreement never talks about cash; it talks about a dollar amount. I believe that answers as best as I can the first question you had asked.

You had also asked about the disclosure statements, and if I might approach, Your Honor, I have four excerpts -- or

some excerpts from the exhibits which we'll pass out, and also --

THE COURT: You may, as long as you give it to your opponents as well.

MR. MILLER: Yes, of course, Your Honor. We are passing out copies of these, Your Honor.

First, with regard the disclosure statement, Your Honor, I've passed out Exhibit E from the first Rosenthall declaration. These are excerpts from the disclosure statement, and we've highlighted on Page 4, which is the opening statement of Net Assets and Liabilities of Debtors and Trusts as of December 31, 2010, and this has a line for assets showing cash and cash equivalents; it has a column for the ERT, which the Court will recognize as the Environmental Response Trust, the former name of what became RACER; and it has a Footnote 4 by the ERT column, and so it's showing 447 median dollars in cash and cash equivalents, and if you look at Footnote 4, Footnote 4 says, "the cash and cash equivalents contributed to the ERT include amounts for" -- and then it has a listing of subcategories, and then Footnote 6 states, "cash and cash equivalents represent cash and investments in U.S. Treasury or U.S. Treasury-backed securities with a maturity of 15 years or less."

THE COURT: Pause, please, Mr. Miller. That opening statement of Net Assets and Liabilities of the Debtors and

Trusts looks to me a little bit like a balance sheet. Is it something different than that?

MR. MILLER: It is a balance sheet, I believe, Your Honor. It's unaudited.

THE COURT: Okay. As of December 31, 2010?

MR. MILLER: That's right, Your Honor.

THE COURT: And it seems to say debtors and Trusts. It is consolidated?

MR. MILLER: Your Honor, I believe it's the -- I believe it is consolidated for the debtors and the Trust. It has the sub column that is not consolidated for the Environmental Response Trust.

THE COURT: Oh. ERT is an acronym for the Environmental Response Trust?

MR. MILLER: Yes, Your Honor, and it's so defined.

THE COURT: That's one reason why I love acronyms so much. Okay. ERT is what we now call the Racer Trust?

MR. MILLER: Yes, Your Honor. In fact, if you look at their pleadings, they're all titled RACER Trust, formally Environmental Response Trust.

THE COURT: All right. And you're relying on Footnote 6 to this balance sheet?

MR. MILLER: Well, Footnotes 4 and 6, Your Honor. Footnote 4 specifically says, "the cash and cash equivalents contributed to the ERT" -- that is, contributed to RACER --

"include amounts for," and then it lists a series of funding accounts, which are actually further defined on the next page. It also refers to the proceeds from asset sales and restricted cash releases that are going to be used to fund ERT, and then Footnote 6 says, "cash and cash equivalents represents cash and secure investments in U.S. Treasury or U.S. Treasury-backed securities with a maturity of 15 years or less," so the term "cash and cash equivalents" is defined. In other words, it cannot be anything except either green money cash or U.S. Treasury or Treasury-backed securities with a maturity of 15 years or less.

THE COURT: And so I understand you, Footnote 4 makes express reference to the Environmental Response Trust, and you'll figure me if I use real words rather than acronyms.

MR. MILLER: Yes, Your Honor, that's correct.

THE COURT: And Footnote 6 refers to all four of the entities whose consolidated cash and equivalents are shown on the first line of that balance sheet.

MR. MILLER: That's correct, Your Honor, but it -- Footnote 6 limits the cash and cash equivalents definition to make it clear that cash equivalents would not be municipal bonds or something else. It would only be Treasury securities and green money.

THE COURT: I see. All right, continue please.

MR. MILLER: Yes, Your Honor.

I would also -- well, I'd like to deal with some of the points that the Court has made and try to reconfirm some of them with further items in this rather voluminous record.

The second thing we have passed up in this stack, Your Honor, is a letter from Mr. Burrs (phonetic) to Mr. Hill in November of 2011, which is in the record. It's Exhibit D to the declaration of Al Coch (phonetic,) and it expressly calls upon the RACER Trust to mitigate its damages and urges the RACER Trust to sell the TIPS if it wants cash, which it could have done at that point at a substantial profit, and I just direct the Court to the paragraphs with the yellow highlighting. Mr. Burrs writes, "While we disagree with you on these matters to the extent you're concerns about how the funding of the RACER Trust with TIPS impacts your accounting reporting obligations, you simply may sell the TIPS to cover any alleged shortfall. You may perceive the initial funding as the difference in the current value of the TIPS far exceeds any perceived funding shortfall. Indeed, we encourage you to take this step to mitigate any alleged damages you believe have been incurred to the defendant of the RACER Trust," and then, alternatively, the next paragraph says, "If you want to give the TIPS to us, we'll sell the TIPS and give you money."

The third thing that we have pushed -- that we've passed up, Your Honor, is a significant and I think helpful document that deals with the understanding of the parties as

they were setting all this up and it bears on a number of issues. This is Exhibit B to the Coch declaration. This is a presentation of, according to the Coch declaration, was made at a meeting in Detroit in November 2010 with Mr. Hill and Mr. Laws present. This was at the point where they were coming up to speed on what was going to be done. This --

THE COURT: Forgive me, Mr. Miller. The date of this?

MR. MILLER: It's November of 2010 and I believe we think the date is November 4, Your Honor, of 2010. The effective date, as you know, is March 31, 2011, and as Ms. Leary said, there was an anticipation that the effective date might have been as early as December, but it was delayed, so this was clearly before any possible effective date.

And one of the things that this outlines, Your Honor -- and I call the Court's attention to this pie chart -- is this illustrates the ladder of TIPS that had been acquired with the concurrence of Treasury for the purpose of making sure that the Environmental liabilities were funded. Some of them may go out as far as 30 years, but this handles funding out through 2025, and I want to call the Court's attention to several things. This is the ladder of TIPS that's being described at the top, and if you see, for example, the 125 TIP shows $167 million maturing on January 15, 2025. The reason this is important, Your Honor, is that the parties did not talk about

the TIPS in terms of fluctuating market value. They talked about the TIPS in terms of maturity value, and the cost basis that was used by MLC is derived from maturity value. It's not derived from fluctuating trading basis. This $167 million is the so called original principal of the TIPS, and I want to clarify something that I think is unclear in some of the briefs. TIPS can go up, but they can never go down in terms of the original principal. If there is inflation -- and there has been inflation since many of these TIPS were created -- the adjusted principal goes up and interest is actually paid on that adjusted principal, but when the TIPS matures, the TIPS always pays its face amount that's guaranteed by the full faith and credit of the United States, and the payment of interest as it goes forward is guaranteed. This makes the TIPS a perfect instrument to fund expenses like environmental remediation that are likely to move with the Consumer Price Index, because, as the Court knows, environmental remediation tends to be going out and drilling wells and pumping water and hiring people and doing tests, and those people -- it's very labor intensive -- tend to have wages that are driven by the Consumer Price Index, so the TIPS inflate with the Consumer Price Index. The TIPS never deflate, however, below their original principal when they are held to maturity.

THE COURT: So your point is, by way of example, that on that January 2025 TIP, that it will pay off no less

than $167 million.

MR. MILLER: That's one of my points, Your Honor, and the other TIPS will pay off the amounts shown. And the further point, Your Honor, is that these amounts were not randomly selected. There was a cash flow projection -- it's fairly complicated -- done site by site and then combined year by year of these steps, and as you know, environmental remediation has time delays that are inherent, and it's you pump water for a little while and then do some tests or you clean up stuff for a little while and then you test it, and this takes time. And the parties had negotiated site by site and agreed on when blocks of money were going to be needed for these environmental remediations. They can't be all done at once. You can't spend it all this year and not have to worry with it for the next 30 years because it's -- I've sometimes thought environmental remediation is a little like the problem of a glass with a -- with something like a dishwashing liquid and you've got to run water in it a little while until the bubbles stop; in other words, they have to pump the water for a while and test it or do other remediating steps, so time is inherent in their mediation process. It's one of the tools that is used. And the parties agreed on when funds were going to be needed, and those funds are provided for by this ladder of TIPS coming in at specific times to match the cash flow projections. This was discussed with the Trustees. I would

point out the states have not said this is wrong, we want to give this back, we don't like the ladder. Everybody agrees that the ladder, which was designed with Treasury, works very well to make sure that the best possible protection was put in place to get these liabilities funded as needed, including inflation protection, because, although the TIPS can never pay less, they can pay more.

Now, there was a point that was made earlier -- in the argument, I believe, by Mr. Kehne -- that the RACER had no arms and legs. RACER did not have the tools once it came into existence to assemble and put this portfolio of TIPS together. This portfolio, as a whole, is much more valuable than the piece meal TIPS, because it was carefully designed by professionals to match the needs of this Trust, and that is what the cost basis reflects. It reflects the fact that they bought the TIPS as they reached the decisions. This was actual money that was paid by MLC. The cost basis is what was paid by the TIPS. The TIPS do fluctuate day to day in terms of what traders will pay for the TIPS -- that's true -- but the key point is, Your Honor, that the accounting standards all say, you've got to value a security based on what is it going to be used for? What is going to be done with that security?

If the security's held by a trading house and they're going to keep it until tomorrow or next week or a week afterward based on the trading value, it has to be based on the

trading value, but if the maturity's going to be held to security, trading value has nothing to do with the value of that security to that user, because that user is going to get the security payment at the end of that time period, and what accounting guidance says for anyone who's going to hold a security to maturity is they look at the cost basis for that security.

This cost basis we believe, by the way, carries forward -- this is the reason for the continuity of ownership discussion -- into the Trust. This is what was actually paid for it by MLC and this is the cost basis. It's true that, when these were bought, there was a -- the TIPS vary, by the way, not only based on interest rate expectations but also inflation expectations. Technically, there's a forward curve expectation of what's akin to inflation. Inflation expectations happened to be a little low in March. They're now much higher, so the TIPS have now gone up and the adjusted principal of these TIPS is going to be much higher. The TIPS are much more valuable, at this point, than CASH would have been or, frankly, than any cash than RACER can come up with, any investment that would have served its purposes.

The point is that TIPS are not really designed for day-in day-out trading in this system. They were a portfolio that was designed to fit this purpose, and this supports, Your Honor, among other things, a point the Court made: we do

dispute the fact that anybody ever talked about fluctuating trading value. Fluctuating trading value made no sense in the context of this transaction. For one thing, nobody knew what the closing date was going to be. It was a somewhat random date. If there had been any intention for a fluctuating closing date evaluation, there had to be some mechanism in the documents to deal with that. There's all sorts of mechanisms in these documents to deal with different things, but there's no reference to a valuation based on a fluctuating closing date. There's no agreement on whose value you're going to use, where you're going to get it, are you going to use noon, or are you going to use the end of the day? There's a lot of issues around that. The reason it was not addressed is it doesn't matter if you're going to use the normal accounting cost basis because everybody knew the securities were going to be held to maturity, and the record reflects everybody's agreement that the securities were going to be held to maturity.

There's another important point here, Your Honor, in this presentation. If you flip over to the last page, there is a reference to the custodial account, and it says, "The custody account to hold Treasury securities transferred to the ERT" -- that was the name then being used for RACER -- "will be set up and tied to the ERT primary transaction account" -- and I think Mr. Kehene made reference to this -- the Trustees worked with the MLC personnel to set up these custodial accounts so the

TIPS could be passed seamlessly, not sold, but passed into these custodial accounts. They clearly knew well before the effective date that they were going to receive these TIPS.

THE COURT: By transfer, you mean by in kind transfer?

MR. MILLER: In kind, yes, Your Honor. If the TIPS were going to be sold --

THE COURT: Kind of like journaling them from one brokerage account to the next?

MR. MILLER: That's correct, Your Honor, so -- and the record shows more than 15 calls and meetings were devoted to setting up these custodial accounts. It was a lot of trouble, so the hand-off was carefully worked out with the Trustees of this group of TIPS. The Trustees, by the way, would have had an opportunity to say, we don't like this mix of TIPS, if they'd wanted to, and MLC would have been happy to do it.

Let me point out that, if MLC had just sat on the cash used to buy these TIPS, it actually would have had more cash, but everybody -- nobody wanted to take a lottery based on, what are the TIPS going to be on the day of the closing? Nobody knew what the day of closing was. That had nothing to do with what they were doing. Nobody was buying these TIPS to hold them for trading. Everybody was buying these TIPS to hold them to maturity, and we suggest that that's why the maturity

keyed cost value is the only value that has anything to do with the facts or the record. There is not a shred of evidence, Your Honor, that anyone ever talked about trading value before the effective date. It's a complete after thought. It came about, clearly, long after this -- or, at least, at the time of this close-out is the first time we heard about it. The so-called true-up, Your Honor, for a $107,000, it goes out to the penny, the calculation there used the cost basis that had been consistently used by MLC. At that time, RACER was carrying this on its books on the cost basis.

So, you know, although there is a question as to whether some rights were reserved, the point is that all of the discussion had been about using this, valuing it at cost basis, which is derived from the maturity value, and there's nothing in the record that suggests that a trading value had ever been discussed or considered by anybody, and frankly, it makes no sense, because the purpose of these trips -- these TIPS and other securities was not to trade them.

The other securities that are not TIPS -- my understanding is that most of those were very short term. They've actually paid. They paid at a premium, and they've been converted to cash, so they're no longer an issue that we have to deal with.

So, Your Honor, the -- I would now like to deal with some of the points that were made in the arguments. The states

have made the argument, Your Honor, that they thought they were going to get cash, and the Court has made a preliminary ruling that cash was what was required. We don't agree that that was what was required, and one of the reasons I would like to point out on that is that the communications that had been had, I understand, with the states were through the Treasury. My understanding is the MLC never negotiated directly with the States. The Treasury acted as an intermediary.

And the declaration of Michael Hill, filed February 3, contains some important statements about the position of Mr. Mark Dowd, who was the RACER's primary contact at the Treasury department. In Paragraph 5, Mr. Hill recalls that Mr. Dowd and Mr. Foo (phonetic), also with the Treasury, stated on January 28, 2011 that, quote, "In Treasury's view, U.S. Treasury securities were the equivalent of cash for purposes of the Trust agreement," close quote. That's Paragraph 6. So, that's a statement saying that the Treasury agreed with the view that cash equivalents, Treasury instruments, could be used for this purpose. And then -- and it's clear that an effort was made to try to get Treasury to come in and make an objection -- in a meeting on October 11, 2011, after RACER had been basically campaigning with Treasury, according to the declaration, to --

THE COURT: What was the date?

MR. MILLER: It's October 11, 2011. This is after this dispute had arisen.

Mr. Hill recalls a meeting in which Mr. Dowd disagreed with RACER's position that the Trust had been underfunded, so -- it's important to understand that, from MLC's perspective, it understood the Treasury thought and all the parties believed that everyone was okay with the use of Treasury securities, and MLC had no reason to believe that the states were not aware of this and that this had not been communicated because it was actually not the place of MLC to communicate with the states. That was not its role.

THE COURT: I can see why you're arguing that's a waiver. I have greater difficulty seeing why you contend that that changes a written contract.

MR. MILLER: Oh, I'm actually offering it, Your Honor, in support of waiver. I also think it's evidence of others interpreting the agreement as --

THE COURT: And you're making reference to Mark Dowd at Treasury --

MR. MILLER: Yes.

THE COURT: -- who is one of the bundle of people who were involved in this back before the confirmation order was entered.

MR. MILLER: That's correct, Your Honor. And Mr. Dowd was identified in the Hill declaration as RACER's primary contact at the Treasury Department. That was how they identified him.

THE COURT: Uh-huh. Now, forgive me, I've got to ask you the same question I was water torturing Mr. Jones with. Dowd is on the Treasury side of the United States Government as contrasted to the EPA side?

MR. MILLER: Yes, Your Honor.

THE COURT: Okay. But what you're also saying is that Dowd, although he worked for Treasury, was the intermediary between RACER and the States?

MR. MILLER: My understanding, Your Honor -- and I was not part of this -- is the Treasury was the intermediary between the States and MLC. I don't -- Mr. Dowd was a participant in that. I believe a Mr. Tannenbaum was also involved in --

THE COURT: No, he's an environmental guy, if I note that --

MR. MILLER: -- in some of this, Your Honor.

THE COURT: Yeah, I --

MR. MILLER: But my understanding is --

THE COURT: There are a lot of people in this courtroom on both sides of this controversy who I know in the history of this case and through other methods.

MR. MILLER: Yes, well --

THE COURT: It doesn't affect my objectivity, but it does affect the fact that I know that Tannenbaum's on the environmental side.

MR. MILLER: Well, I'm not suggesting Mr. Tannenbaum was in these meetings, Your Honor. I'm actually trying to make a full disclosure that I believe Mr. Dowd was part of this, but there were others who were part of the intermediaries with the State. We only know about these meetings through the declaration of Mr. Hill because MLC was not in these meetings, but MLC had similar meetings with Treasury, and I will tell the Court -- and this is in our papers -- that the MLC DIP Lender Trust is funded by Treasury, and our fees are approved by Treasury, and my experience is that clients rarely pay me to oppose a motion they agree with. So my presumption is that since we have a budget to oppose this motion, that we are here with the approval of Treasury. I can't speak for the United States.

THE COURT: I feel more comfort in drawing that inference you're asking me if I knew who was Mr. Jones' client.

MR. MILLER: Well, Your Honor, I hope I know who mine is.

The -- I want to go back now to this -- to the Court's, I think, completely correct analysis of waiver and damages. We believe there is no doubt about the fact that Mr. Hill and Mr. Laws were acting for the Trust. They knew that the Treasury securities were coming in. They wanted those Treasury securities. They were actually better than cash for their purposes because they were already invested, they've been

working, they were laid out perfectly, and the truest evidence that nobody's unhappy with those is nobody wants to give them back. Nobody actually wants to sell the TIPS, and we're not urging, by the way, the TIPS should be sold. We think -- and this includes the Zero-Coupon Bonds -- we think this was a perfectly designed investment portfolio, and we still think it was well designed. It was a long-term plan, and we think that plan is still right on track. And I would point out there was some concern by Ms. Leary about whether this Trust can have enough money in it. There's about a hundred million dollar cushion built into this Trust that's a contingency fund over the best estimates. The TIPS have actually already gone up in value and we have a statement in the declaration of Mr. Rosenthal that confirms that as of about a month ago, the TIPS were $36.1 million in trading value over the cost-based value that was used, and they've gone up I understand about another million dollars in trading value over the last month. That's important because it leads me to my next point which is New York damages law. And for that purpose we passed up a case, Your Honor. This is the last of the four items that I sent up. There are a number of cases, but this is the New York Court of Appeals in sort of a landmark case, the Freund v. Washington Square Press case, dealing with contract damages. And if you turn to page 3 -- excuse me -- we've highlighted about three sentences that I'd like to call the Court's attention and talk

about. It's axiomatic that except where punitive damages allowed, the law awards damages for breach of contract to compensate for injury caused by the breach, injury which was foreseeable, i.e., injury within the contemplation of the parties at the time was entered into. Money -- and then there's a citation -- money damages are substitutional relief designed in theory, quote, "to put the injured party in as good a position as he would have been put by full performance of the contract at the least cost to the defendant and without charging him with harms that he had no sufficient reason to foresee when he made the contract," closed quote. And then, Your Honor -- that was a Corbin quote. I'm going to skip over some discussion that has to do with foreseeability and benefit of the bargain, and go down to a sentence that says, "but as equally fundamental to that," -- just a minute, let me start over -- "but it's equally fundamental that the injured party should not recover more from the breach than he would have gained had the contract been fully performed." This is a statement of what's sometimes called the one-recovery rule, it's a statement of what's sometimes called the no-windfall rule, and that is that if a party has actually -- is going to actually receive more as a result of the breach than without the breach, then they have no damages. It's a limitation on the normal damage rule.

I do want to deal briefly with the point that is made

about this New York rule that says that damages are to be set at the time of breach. It's true that there are a number of cases that say that lost opportunities after the breach can't be used to increase damages, and there are some that say it can't go the other way. And that actually deals with this statement of Mr. Kehne that RACER would have taken cash and would have invested in TIPS with a greater value, or would have invested in something else. This breach rule actually cuts off speculative loss profits. But the breach rule does not have anything to do with the analysis of the one-recovery rule or the windfall rule, because those things always come up after breach. It also doesn't have anything to do with mitigation of damages. Mitigation is always post breach. This has to do with fixing the initial damage and for that reason, Your Honor, I'd like to call your attention, for example, to another case we cite --

THE COURT: Pause, please, Mr. Miller. Would the corollary of what you've just said be that you can't claim credit for the fact that they're 36.1 ahead?

MR. MILLER: No, Your Honor. And the reason is that if they keep the TIPS, then the result is going to be that they're going to have a windfall and they're going to be ahead. In other words, I'm not trying to say that you use that --

THE COURT: You're not saying that they should be penalized for getting the 36.1, what you're saying is all they

got to do is hold on to the TIPS and they'll get the exact benefit of their original bargain.

MR. MILLER: That's one of my points. Yes, Your Honor. But that --

THE COURT: But you're saying something different as well?

MR. MILLER: Yes, I am saying something different as well. I'm saying as well that their proposal is, we'll just keep the TIPS and you give us another $13.5 million. That would be a windfall recovery because the TIPS they want to keep, which they say is a mistake -- you get -- you sent us something wrong, it turns out it was worth more than what you were supposed to send us, we just want to keep that and you also send us some of the other things we wanted. That would be a windfall, and I will explain that with a case in just a moment, Your Honor. And windfall is tested after the fact, because windfalls occur when people get paid more than they should get paid for a breach. The Wackler Weichert (phonetic) case, Your Honor -- I'm not sure if I'm pronouncing it right -- Wachner v. Frost (phonetic), which is cited in our brief, was a case in which a condominium developer, a New York case, received a settlement of $60,000, then an arbitration award for the full amount of the same damages. And the Court said -- and of course, kept the $60,000 -- the Court concluded if the award, referring to the arbitration award, were to remain

intact, plaintiffs would receive a windfall, the award cannot stand. There are a number of cases like this that deal with the fact that somebody has already gotten their damages taken care of, and now they want to get the damages again from another source. And the rule there is one recovery, and what we're suggesting, Your Honor, is that if they keep the TIPS, they've already had their recovery. If they want to sell them, fine, they can sell them, and they'll have their recovery. But if they want to give the TIPS back, that's fine with us. Mr. Berz proposed that. They should have done that, by the way, at the time it was proposed to mitigate their damages. They shouldn't sit on the TIPS, not sell the TIPS, and then say we wish we'd sold the TIPS at some other time. That's not a fair result. You're completely correct, they did not mitigate their damages. The point is that under New York law, if you accept the State's theory they should have had cash, then they still have no damage, because what they got was worth more frankly than cash to them as a useful tool for the Trust, and if they wanted to mitigate it, then if they'd done anything to mitigate it, what should have happened is they wanted cash, they should have sold the TIPS as soon as they knew about it, and then we'd settle up on the cash and there would be virtually nothing due, in fact we think money technically would be owed back to MLC. Now, we're not seeking any money back, Your Honor, and frankly MLC wants to see the Trust succeed and wants to see the

environmental liabilities covered, and believes TIPS is the right way to do this.

There may have been some mistake in conforming the documentation in the plan, but the mistake here was not to put the TIPS together. Whether the States were parties to that or not, that's really not something MLC could deal with. MLC couldn't advise the States. MLC assumed that the States were being advised either by Treasury or by someone else that they were going to use TIPS, and frankly it never occurred to any of the people who were investing in these TIPS that this wasn't a good idea.

Let me deal with a few more points in the argument, if I may, Your Honor, and then I'll try to conclude it for you.

You did ask a question which I think I've answered which was whether a fact had been assumed that on which there was a disagreement as whether the parties looked at trading value as opposed to the time that the -- what TIPS would be worth when they were held to maturity, and you were absolutely correct, and I think I've shown that with the PowerPoint, and the record is replete with the fact that the parties were not interested in the TIPS as a fluctuating investment. They didn't have the staff to deal with day trading.

THE COURT: Let me interrupt you for a second. That PowerPoint; you're talking about the meeting of November 2010, if I'm not mistaken?

MR. MILLER: Yes, Your Honor. That's an example.

THE COURT: And was that PowerPoint shown on a screen or handed out in paper to the participants at that meeting?

MR. MILLER: Let me ask, Your Honor. It was handed out, I'm told, Your Honor.

THE COURT: Okay. And the participants at that meeting included RACER personnel?

MR. MILLER: Yes. This was a presentation to Mr. Hill and Mr. Laws --

THE COURT: -- where they were the actual targets of the presentation?

MR. MILLER: Yes. They were the subjects of the presentation. Mr. Koch and others went to Detroit to explain this to them. And this was a central part of the presentation.

So, there -- I wanted to respond to your point that yes, MLC believes that the value that was looked at was always the ultimate value, and I would stress, Your Honor, that there is -- when you look at the cash flows, they needed $167 million in 2025, according to the projection going forward, or actually it's more precise to look at the $19 million that they needed by July 15, 2020. There was no assumption that the TIPS were going to pay a certain amount of appreciation for inflation. This was the face amount. If there had been deflation, which by the way would have reduced, presumably, remediation costs,

the TIPS were guaranteed at this price. So the -- everybody was looking forward to what was going to be there when they needed the TIPS, not looking at the day-to-day fluctuation.

I think I've already dealt with the issue that the short-term securities which are -- by the way, the securities that are shown here at the bottom of this list, these are the non-TIPS securities -- that a number of those were January of '10 and July of '11, that's 300 -- about $400 million worth of that, those have all paid, and we understand they paid -- actually they matured and they came in at those values, so there's no real dispute about that. That cash is already in the RACER Trust, and on information and belief, Your Honor, we understand RACER has not invested that cash. We are not aware that they have an active investment program. You may want to clarify that.

THE COURT: Well, if it's on information and belief, I don't think I should be relying on it in an evidentiary hearing --

MR. MILLER: I don't think you should, Your Honor.

THE COURT: -- of this character. I'm happy to go with uncontroverted declarations --

MR. MILLER: All right. Thank you, Your Honor, but --

THE COURT: -- and documents, but --

MR. MILLER: -- let me say that the record does not

reflect that any investments have been made with that cash that would be inconsistent with RACER wanting to rely on the TIPS and the program that was set up. In other words, there's been no inconsistent conduct.

There was a reference in I believe it's Mr. Kehne's argument to the fact that this portfolio was expensive to set up. That's a good point. I mean, it's not just the piecemeal value of these tips, it was the fact that this was a professionally designed portfolio, custom tailored to the needs of this Trust. That's the value to this Trust that it received. And the cost that was reflected here was part of the fact that these TIPS were bought as they were available. They're not always available on a given day, I'm told, in exactly the right denominations and the ideal mix. They were collected over time, so our belief is that the value of this portfolio is correctly reflected under standard accounting practices by the cost basis, the amortized cost basis. So --

THE COURT: You're not suggesting that the cost shown would capitalize the expenses in terms of labor and professionals and so forth --

MR. MILLER: No, I'm not, Your Honor.

THE COURT: -- to put it together?

MR. MILLER: I'm suggesting those are additional values that are not in the record anywhere. I mean, if this were a traditional damage case, and if the plaintiff were

trying to prove that it got something less than it was supposed to get, it would have to prove what the value was of what it did get. There's really no proof in this record of anything except this trading value assertion which has no reference, as the Court's pointed out, to anything in the contracts, nor reference to anything the parties did before, no indication that that's how accounting would deal with these. It's really a constructed legal argument, and what I am suggesting is that the value of this really to the Trust included the time and effort that was put in to assembling the portfolio, not what it would be, basically, a fire sale if you took all this stuff and sold it to day traders, which is what the trading value is.

So I'm suggesting that again, this is another reason why there is -- where there are no damages, why mitigation could have taken care of the complaint by the States. If they really wanted cash, they could get cash. But nobody wants cash because this is more valuable than cash. And I already referred to the fact that there was no mechanism to appraise these on a day-to-day basis that ever came up. And I -- there is -- I think this is a small point, but it is -- I do want to clarify it. The Hamilton declaration does refer to a conversation about a dispute over value. The parenthetical that has claimed to be a reservation of rights is not identified in the Hamilton declaration as having anything to do with this dispute. It just says there's a parenthetical there

that says subject to the RACER funding adjustment. There were lots of adjustments that were being made at that point, Your Honor. Property was being sold, things were happening, there were provisions dealing with adjustments. So there's nothing in the record that suggests any written reservation of rights, and that's consistent with the fact that the parties continued to deal with this on a cost basis.

I would note that in the States' argument, there was no suggestion that they would like to give back the TIPS and get money. And I think that that is -- that's a key point. This argument that the TIPS lost value between October and November -- actually between October and March -- that's a purely theoretical, unrealized loss. They then gained value. There was no risk that the value for the Trust changed. The maturity value was always the same, the inflation protection was always the same, and subsequent events have confirmed that -- which is not part of the damage analysis, Your Honor -- but had confirmed the fact that there is no evidence of any real loss. It's just a hypothetical claim that they could have sold and could have bought and the hypothetical sale never occurred.

I do want to correct one point. There was a statement that if there's any money left over, it goes to back to the Treasury. I believe it actually goes to the environmental super fund, if there's any money left over. So I just want to correct that point on the record.

So in conclusion, Your Honor, we agree with certainly your analysis that there could be no damages even if there is a technical violation of the use of the term cash. We believe there is a waiver -- there's waiver by conduct, by full disclosure, by the setting up of the custodial accounts. We believe that this is a dispute between the Trusts, and the beneficiaries don't have a right, normally, to come in and sue unless they somehow seize control of the Trust and change things. It's like a shareholder suing for corporation, by the way. This Trust -- the Trust speaks for the Trust in terms of RACER Trust, and we believe its clear agent is the Trustee. It has no other agents that exist that we know of. I'm not aware that there's any board or other institution that governs the Trust. It just has the Trustees. So there's no doubt that Mr. Hill and Mr. Laws were agents for the Trust and the Trust is the other party, the RACER Trust, in this process. And we also -- we believe the Court's analysis is essentially correct on all issues except we want to stress the fact that we think there was complete disclosure as far as MLC was concerned of -- and the Treasury -- of the fact that this was going to be funded by Treasury securities as well as by cash. There was agreement on that and we think that that was in effect course of conduct that clarifies what the amount, the dollar symbol, in the settlement agreement meant. And therefore, we don't agree that there was a technical breach of the contract, but

even if there was, we agree with the Court there's no damage.

I'd be happy to answer any other questions the Court has.

THE COURT: No. You took care of me as we went along.

Okay. Am I right that there's nobody on the MLC side who wants to be heard before I give people a chance to reply?

All right. Mr. Kehne -- and I realize that I don't know if I pronounced your name correctly. I've heard it now two ways in addition to how I was calling you. What do you prefer and how much time do you want?

MR. KEHNE: Kehne and until you don't have any more questions for me. It should be relatively brief, Your Honor.

THE COURT: Then we're not going to take a break. We're going to go straight forward, and again I apologize for mispronouncing your name. Come on up, please.

MR. KEHNE: I answer to everything close.

Well, I want to touch first on the question of notice and the effect of the disclosure statement. I think on its face, the disclosure statement could not be notice of intent to transfer securities on the effective date let alone an intent to transfer them at net book value as opposed to the cash equivalent value. It's dated December 31. It would have been -- it have been --

THE COURT: Dated what date did you say?

MR. KEHNE: It's dated three months before the effective date. So it's a statement of what was on-hand and it's completely consistent with an understanding that these are the assets that we've targeted for transfer to the Trust. It doesn't say that they will continue in this form. If I'm the States and I -- or the Tribe and I get this, I don't see how I'm supposed to understand that this is notice to me to raise my hand if I object to the transfer of securities at all, let alone the transfer of securities at less than fair market value -- excuse me -- for stated claim valuation above their fair market cash value on the effective date.

And I want to stress that it would have been -- it have been quite easy for MLC -- for the debtors, excuse me -- prior to the effective date to provide notice to the world. They may not have had an open line of communication. They may not have been calling the States and the Tribe routinely. But it would have been quite easy for them to disclose in a monthly operating report or just in a statement to the world that by the way, even though there's a gap opening up here between the fair market value and the net book value of these securities, we are intending to transfer them in lieu of cash, and we're intending to transfer them for whatever their net book value is on the effective date regardless of the gap that's opening up between -- that's opened up between the net book value and the fair market value. I'll refer you to Mr. Hamilton's

supplemental affidavit where he indicates that he was aware of that gap, he was preparing monthly reports that documented that gap, and he had discussed that it was potentially problematic with Mr. Rosenthal at MLC. I do not think this was a surprise to ML -- to the debtors that this was potentially an issue, and if they had wanted to provide notice, the kind of notice that really could have provided a knowing waiver, it was perfectly within their means to state that clearly to the world, instead of referring in retrospect to a three months -- what was three months passed by the time of the effective date two footnotes that don't say we intend to transfer these assets in their current form, let alone how they intended to value them.

A cost to the debtors, by the way, and to Treasury of doing that would have been that -- it would have probably brought people into your courtroom in advance of the effective date to clarify, and if they had, in fact, announced that even earlier when the purchased the securities, they would have been bound to follow through, regardless of which way the assets moved. As things stood, they weren't committed with any clarity at all at the time of the purchase to using fair market value or net book value. They could see which one was more advantageous.

I want to touch next on the waiver issue. And there's a couple of components of that that I think need a little more attention. One is the notion that we were acting

as agents for the States, and there was some discussion with Mr. Jones of whether there's an agent relationship between the Trustee and the beneficiary. But it's important to note that we are not, even the Trustee for -- we do not have a Trustee-Beneficiary relationship with the States or Tribe. The settlement agreement and Trust agreement are quite clear that -- both say specifically that the sole beneficiary of the Environmental Remediation Trust is the United States, the collective United States. It is not the State and the Tribes. The State and the Tribes have separate and independent, fully preserved rights to enforce in this Court their rights under that settlement agreement and Trust agreement. They were in no way dependant on us, and we, although the objectives of the Trust as set forth in the documents include advancing their interests, our legal obligation as a Trust is to our beneficiary, and that is the United States.

Now, there was a -- this is a small point, but there was a representation that TIPS can't go down. That's not quite correct. If you sell out of the TIP before its maturity, it can go down. If you hold it to maturity, the TIP cannot be worth less than the initial value. But if, for example, at one of our 60 sites, we had an acceleration or an increase in the cost of the remediation, we may well some time down the road be required to sell out of a TIP before its maturity because its maturity, after all -- the maturity dates of those TIPS were

after all geared to long-term estimates of remediation cost curves for 60 different sites. It would be unprecedented if you could take a random 60 environmental remediation sites and not find any that strayed from the cost curve that was projected as far in advance of the real expenditures and the real work as we're talking about here.

By the way, one of those sites has a $120 million budget -- that's the New York Messina site. And when there are remediation activities of that scale, I think that the odds of a need to accelerate go up. So it isn't a lock that these securities will all be held to maturity. That's the expectation and the hope, and that's our understanding and hope as things stand now, but it is not an assured outcome.

There was a reference made to the cushion account for the environmental remediation in this context. The cushion account for environmental remediation is $68 million, but there are strict limitations on the Trust's access to that cushion account. It has to be determined that it was an unforeseen cost, so if there are known and foreseeable remediation issues and they turn out to be more expensive or to need acceleration to avoid additional environmental damage, that is not an occasion to reach the cushion account. And that also bears on the prospect that the Trust may need to get out of some of these securities before the maturity date.

Now, I understood Mr. Miller to say that sort of a

background accounting principal that ought to inform the Court's understanding of what was known by all the interested parties prior to the effective date is that there's continuity between the debtors and the Trust with respect to these assets, and that we have a carry-forward basis. I'm not aware that that was addressed in any of the pleadings that RACER, in fact, is entitled to use the net book value basis, and in fact our analyses have all been to the contrary, that we have to mark to market. It's also worth pointing out with respect to the accounting issue; to the extent that it's intended as sort of a background principal of what everyone would understand about a proposal to transfer this portfolio of securities that there are all kinds of different ways -- different occasions to value assets. For example, there's tax valuation of these assets, and the general rule for tax valuation is that it's marked to market, and there's in fact been a filing by the GUC administrator with respect to the wrap-up value of assets for tax purposes that were transferred to ERT. There's no representation --

THE COURT: Pause, please, Mr. Kehne. There's a fairly well-entrenched principal of bankruptcy law that when we look at valuations -- and you don't need me to tell you that valuations are engaged in for a host of different reasons in bankruptcy. I could probably come up with seven or eight off the top of my head, and I think 506(c) of the Code says it in

baby talk, that valuations are engaged in with a view toward the purpose for which the valuation is undertaken. Here, of course, we're talking about a dispute of contract law, but do you differ with the concept that when I'm looking at a valuation controversy, the best way to do that would be to take into account the purpose for which the valuation is undertaken?

MR. KEHNE: Yes, I think that's a proper approach, but I would say that the purpose for the valuation here needs to be determination of whether the funding obligation was met. And one point I want to emphasize in that respect is that the instructions to make a cash payment in the settlement -- in the Trust agreement, the plan, and the confirmation order, and the requirement to transfer dollars, all specify on the effective date. The instruction to transfer asset -- financial assets, cash in particular, to the Trust to fund its efforts specify on the effective date. They don't say transfer this value at a future point in time assuming that you're permitted to hold -- that you're able to hold the assets to maturity. There's not just a valuation term in the controlling documents, there's also a time term, and the time term says on the effective date. So valuation of these securities on the effective date I don't think can be undertaken by reference to the value at maturity just because the Trust has deferred to Treasury in regarding this as a prudent portfolio of securities to hold going forward given the information that it has now.

THE COURT: Okay. Continue.

MR. KEHNE: There are two -- first I want to address that case law that was provided to you by Mr. Miller. This is the Freund case. Freund case and Wexler case both provide -- both contain broad statements of an anti-windfall principal, but they do not contain statements of an anti-windfall principal that negates the assess-the-damages-at-the-time-of-the-breach principal. Neither involve --

THE COURT: Couldn't hear that last part. Forgive me.

MR. KEHNE: Oh, sorry. Neither Freund nor Wexler in its broad statement of an anti-windfall principal purports to swallow the rule that you assess damages at the time of the breach. Neither case involved the valuation of assets. In Freund the issue was whether a frustrated author would receive the benefit of a breached promise to publish his books in terms of the profits that he could show he would have realized, or whether he was entitled to the cost that the publisher avoided by breaching. There's no asset valuation in that -- issue in that case. The Wexler case was about double recovery under a settlement in parallel litigation against one of the other defendants. Again, the anti-windfall principal was recited for common sense kind of outcome that you don't get to double recover, but there was no holding in either of those cases or any of the others that MLC DIP Lender Trust had cited to you

that purports to negate the broad principal that where there's a need to measure the value of assets or the value of performance to determine damages, the valuation is done at the time of the breach and not later when the assets actually delivered could have increased or decreased in value. And if you apply the anti-windfall principal to say either that mitigation of damages requires us to sell, or to say that there's in fact no harm and we're seeking a windfall, then you do negate that fundamental principal of New York damages law, that the value -- that the cost -- excuse me -- that the amount of the damages are assessed at the date of the breach.

The other case I want to cite -- I want to refer you to is cited on page 17 of our second brief, and this goes to the question, Your Honor, of a Trustee's ability to modify the terms or the obligations of an agreement, a consent order, in that case as well as in this, with effects on other parties by agreement. And that's the Resource Technologies Corporation case of 2010, Seventh Circuit case. In there a bankruptcy trustee essentially acceded to one of the parties' substitution of direct payments for establishment of an escrow account.

THE COURT: Couldn't hear that.

MR. KEHNE: In that case, the bankruptcy trustee in a bankruptcy proceeding acceded to, or arguably acceded to, a parties' substitution of direct payments for establishment of an escrow account from which those payments could be made going

forward. And there was no -- the Court didn't take on the issue that the trustee had accepted that, but said, "The Trustee's knowledge of Chiplease's direct payments has no bearing on Chiplease's obligation to comply with the escrow order. Chiplease and the Trustee could not privately agree to modify a settlement agreement that was approved by a Court order. Unlike a private contract an agreement whose every provision has been approved and therefore activated by Court order requires Court approval before it may be modified." And it cites an earlier Seventh Circuit case from 2004.

And we think that that's important to this notion that -- as you know, we think there are many difficulties with the notion that the Trust's acceptance that it would receive securities on the effective date waived its right to object to an improper valuation of those securities which was in no way signal to the Trust, and could have been easily by the debtors. But even stronger, I think, is the argument that the States and Tribe can't have their rights under the consent order affected by the Trust's actions, even if the Trust had behaved in an irresponsible way, which emphatically we do not believe is true.

And I just want to circle back to, before I sit down, to the windfall point again. The notion that because these assets are worth more now than they were on the effective date, and in fact are worth more now than a cash payment would have

been worth on the effective date had we kept it all in cash, is irrelevant first because of New York damages law, and assess at the time of the breach principal, but it's also irrelevant because I think we have an uncontradicted record that if we had received cash, we would be $13.5 million down from -- excuse me -- $13.5 million ahead and in exactly the same position with respect to our securities portfolio as we are today. The only difference if we had received cash is that we would have -- we would purchase that preapproved portfolio and had $13.5 million more in short-term assets.

THE COURT: Wait. I lost you there, Mr. Kehne. If you had gotten the full amount in cash on the closing date, on the effective date, why wouldn't you have that same amount of cash less whatever you had spent between then and now at this point?

MR. KEHNE: Because the Trust was already aware of the effort that had been undertaken to match the projected cost curve of its remediation efforts and administrative efforts with securities. It would have been irresponsible for the Trust to hold those assets in short-term --

THE COURT: -- in the cash that Trust had bargained for?

MR. KEHNE: Yeah -- in cash, because the Trust -- well, the Trust and the settling parties didn't bargain just for cash to hold in eternity. It bargained for cash and a set

of authorities to manage that cash responsibly.

THE COURT: So you're saying the Trust if it had that pile of cash as the contract originally provided for would have done the exact same thing that MLC and Treasury collectively decided to do before the effective date?

MR. KEHNE: That's exactly what Mr. Hamilton's first declaration states, and the reasons -- I mean, I think it's very sound -- I mean, I think it's easy to understand why, and it's also consistent with what the Trust has actually done. Nothing has prevented the Trust from changing that portfolio of assets, but the Trust has not spent the money to reconfigure that, to hire JPMorgan and Mesirow and undertake a planning effort. We haven't had a change, a significant change, in our cost projections to this date that would require that. And we knew on the effective date that Treasury had already approved this. Why -- with everything else going on in the Trust's work, it would have been a very ill-advised exercise to try to rethink the investment strategy of the Trust on the fly on the effective date. And what the Trust has done is consistent with what Mr. Hamilton says it would have done if it had received cash, which is to hold those securities in that form. The only difference, again, is that we would be $13.5 million ahead if the contract had been fully performed -- excuse me -- the consent order had been fully met.

THE COURT: Okay.

MR. KEHNE: If there are no further questions, that's it for me.

THE COURT: Thank you. Ms. Leary, I'll hear your reply, but of course, briefly and taking into account everything that's already been said.

MS. LEARY: Yes, Your Honor. I want to correct a couple of things Mr. Miller may have misunderstood or maybe I misunderstood. I just want to clarify them for the Court.

This document, the finance and administration transition document, that was a PowerPoint apparently for the Trustee, Mr. Laws and Mr. Hill --

THE COURT: Uh-huh?

MS. LEARY: -- it would have been nice if the States had seen this before they signed the agreement. We might have been fine with it. I can't tell you that. I did not want to leave any impression with the Court that we had any idea about this, and I also want to correct any perception the Court may have that Mr. Tannenbaum was somehow aware of this as well. It is my understanding that he was not. And that the States and he and other members within D of J found out about the dispute and about this whole mess at the same time we did, which was the middle of November. There was nothing that Mr. Tannenbaum -- and more importantly, and this is really critical --

THE COURT: Well, again, we're getting a little metaphysical here, and I need to put you through the same water

torture I put Mr. Jones through. Mr. Jones has made it repeatedly clear to me that he represents a single client, which is the United States. And you're saying now for this purpose, I should make a distinction between the EPA or the -- I guess he's not in the EPA, he may be the DOJ who deals with environmental issues, but he's kind of like an environmental guy, and without a doubt, he's an employee of the United States Government, which for that matter, so am I. But you're saying that I should for this purpose make a distinction between Treasury within the United States Government and the DOJ and/or the EPA within the United States Government.

MS. LEARY: I'm not suggesting that. All I'm suggesting is that I don't want you to be left with the impression by virtue of Mr. Miller's statement that Mr. Tannenbaum participated in any of this, and I also want to make very clear that Mr. Dowd and no one at Treasury represented or were authorized to represent the State of New York or any other state in negotiating with MLC. Negotiations between the State of New York and MLC at that time were ongoing, the door was open, we were talking. I spoke with probably Mr. Berz, Mr. Goslin, Mr. Schmolensky (phonetic) -- I mean, I could tell you there's no reason that we did not know about this. There's no reason. And as Mr. Kehne said, had the Trust exercised its discretion, which it was clear in the consent decree, it has discretion to invest, it would have been 13.5 to the better.

I don't know whether we could have resolved this had we known about it, but I don't want you to be left with the impression that somehow Mr. Dowd was authorized to do this or participate in this or say this okay or any of that. I don't think there's evidence before Your Honor, Mr. Miller presented none, about that authority. And that's all I'm saying. Mr. Tannenbaum didn't know and Mr. Dowd did not represent the States or the Tribe.

One thing I also want to clarify again, Mr. Miller was not a participant in the almost over a year-long negotiation on this consent decree. There are two pieces to this consent decree; one is the agreement, and the other is the Trust. So they're attached to our opening joinder, and it's one document that's complete. It is not just the agreement, and if those two documents are read together, and I submit they're the only two, they govern the matter and the Court doesn't need to look outside at a PowerPoint or anything else. I also want to clarify that what the States agreed to in the consent decree was a lump sum of money that was based upon calculations. There was no agreement on cash flow projections as I thought I heard Mr. Miller say. I may have misunderstood. We never saw this ladder approach or when things were going to mature. As far as we knew, we had an idea of what it was going to take to remediate sites, there were different tasks that were given dollar amounts that added up to a dollar amount as

Mr. Kehne indicated. For example, Messina, $121 million, that's what we understood and agreed to, nothing about this projection or when things mature or any of that.

Very important I think is to understand that Mr. Miller wants to have this Court look into a crystal ball and say everything's going to be fine, they're going to have so much money, they don't need this $13.5 million. And it's important again on the environmental side, fires and explosions and other emergencies happen at these sites, and you will have to liquidate TIPS sooner, and you will lose money as a result. That's why you need all the money you can get. And the fact of the matter is this is sort of $13.5 million that we would have had had the deal been followed through as it should and the investment discretion been exercised by the Trustee.

I think -- this concept of offering in November of 2011, Mr. Berz's letter that Mr. Miller raises, the concept of offering in 2011, late 2011, to take back the TIPS is so disingenuous because the value of the TIPS at that point had increased. That doesn't mean that we weren't entitled to the 13.5 million initially required. All it means is that it is not -- it was too late. It was too late, and I don't think the Court can impose a mitigation requirement at that late date, which was less than a month before we came here with the dispute.

I also want to clarify the States, I believe, have a

full reservation of rights on page 59 of the agreement, and another thing is that the dollars that are left over if there are any go to both Treasury and the Federal superfund. So there are two pockets that any excess money will go into. Again, just a factual.

But in closing, Your Honor -- oh, I do want to make one point about the 506(a) question that you posed. So, 506(a) is --

THE COURT: I thought I said 506(c), how you value a secured claim.

MS. LEARY: Well, I might have read the wrong thing then, because 506(a) talks about such value shall be determined in light of the purpose --

THE COURT: Oh, forgive me. Then I think you're right. Just a minute, please.

MS. LEARY: Didn't we have this with 362(b)(4), last time I was here?

THE COURT: Yeah, I think we did.

MS. LEARY: So, such value --

THE COURT: No, you're -- I've been asked for so many 506(c) waivers that I think I've had that on the brain. You're absolutely right. When we value under the allowed claim of a secured creditor, that's covered by 506(a) and not (c).

MS. LEARY: So, it's such value, quote -- 506(a)(1), "such value shall be determined in light of the purpose of the

valuation and of the proposed disposition or use of such property, and in conjunction --

THE COURT: Right. That's what I was making reference to.

MS. LEARY: -- with the hearing."

Now, so I gave that some thought, and I thought, okay, what is the purpose of the valuation here? Because I think this language is instructive. You're not valuing a secured claim, but it's instructive to the extent that the purpose of the valuation is really for the parties to the consent decree to be assured that they got everything they bargained for. And to elicit from the document itself what that was. And so the purpose of the valuation is really to assure compliance with MLC's payment obligation, and --

THE COURT: -- to ensure that your environmental folks have the money they need to do the work that needs to be done.

MS. LEARY: -- that -- you took the words out of my mouth, Your Honor. That's exactly right. So the proposed disposition and use of this property is to assure environmental compliance, not environmental compliance to the extent of 641, but environmental compliance to the extent of whatever the dollar amount is that the Trustee invests and gains for the Trust. And --

THE COURT: Yeah. And you're saying that helps you?

MS. LEARY: Well, I believe it does, because had the Trustee exercised its discretion on the effective date to do the investment, we would have been 13 point -- the Trust would have been $13.5 million to the better, is my point. They would have had 641 million to purchase the TIPS and our position is we would have had that additional money that we do not have now, that was the shortfall. So it's to grow the Trust. So the purpose included --

THE COURT: Well, cash wouldn't have grown. Cash would have been cash.

MS. LEARY: But this is what I'm -- my point about the crystal ball. You're -- the Trust has indicated in the record, or in the evidence in the affidavits and declarations, that they would have invested in the TIPS. It was a prudent thing to do. The question is what would they have gotten on the effective date to make their own investment decision? We submit they would have gotten $13.5 million more had they made the decision themselves. And the crystal ball aspect of this is to try to figure out, I guess, and Mr. Miller went here a couple of times, he's projecting out in a neat little world what may be. And his citation to the Freund case assumes that later there's going to be a lot more money than we needed. And I don't think that there's anything before the Court on an evidentiary basis or, may I suggest, in reality would this happen -- I made this point earlier -- that there's really

going to be a big amount of money later.

So I don't think the windfall -- I don't think that case is applicable, and I don't think there's any evidence before the Court that there is going to be a windfall. The only question really is is what did we bargain for? And the States again submit, respectfully, is it fair to impose on the States something that MLC had every opportunity to talk to us about before we executed the agreement, so we wouldn't have this misunderstanding. And we'd be very clear about a laddered approach and when they'd mature and all of those things that when we put cash in that agreement we wanted to avoid, any kind of fluctuation of on securities. I'm not suggesting these are -- these particular securities have huge fluctuations, but as you pointed out at the opening of the hearing, based on interest rates, they indeed do.

THE COURT: Okay.

MS. LEARY: Thank you.

THE COURT: Thank you. I'll take briefs or reply, but obviously limited to the new stuff.

MR. MILLER: Thank you, Your Honor. Ralph Miller. I'll be very brief. I just want to correct some of my own confusion that I may have caused.

First, I used the term "cushion" with a lower case C when I referred to the cushion amounts. There are two accounts; there is a cushion funding account totaling

$68,233,823, and then there is an administrative funding reserve account, totaling $40 million. I was referring to those two collectively which go over $100 million. When I made reference to contingency funding that is built in, I just want to correct that. I was certainly not intentionally misstating.

I also wanted to clarify, when I said that I understood that there were cash flows; I understood that I did not participate, that site by site, there were cash flows over time and that the States were involved in that, and that those site-by-site cash flows were aggregated into annual cash flows, and that was the basis that was used for the total amount that was due from the TIPS.

And finally, Your Honor, this argument that's been repeated that if there had been more cash, there would have been an immediate effort to reconstruct the ladder of TIPS that had been bought over a period of time before professionals is frankly a nonsensical claim if you were assuming a but-for world in which people had said we want cash. The ladder of TIPS would not have existed. Nobody would have created a ladder of long-term TIPS in MLC to hold it for four months or two months or three months. It was a long-term project, it was developed. Their argument that they could have come in with this cash and created and developed this ladder is precisely the kind of lost opportunity claim which the New York Courts have said you don't get to consider. You can't say, gee, if

we'd had this cash, we would have bought Apple stock when it was low. Gee, if we'd had this cash, we would have bought TIPS. That is prohibited by the date of damage analysis, but the date of damage analysis says that's the initial calculation. There are limitations on those damages that arise afterward; one is the duty to mitigate, which always -- almost always arises after the breach. One can't mitigate until the brief happens, and the other is the windfall doctrine which almost always has to do with so what has actually been received by the damaged party. And those are applicable to say that if they keep the TIPS, which MLC is happy to have them do, they have not been damaged. Thank you, Your Honor.

THE COURT: All right. Thank you.

All right, folks. It's just about one o'clock. We've had a long morning. Here's what we're going to do.

I'm very sensitive to the point that Mr. Jones made that this deserves an expeditious resolution. I want you to take a long lunch hour, be back here at 3 o'clock. I don't know if I'll have what I need to give you a ruling then or not, but I want to try. You can tell the marshals that I gave you a cell phone waiver, those of you who aren't lawyers who already have a cell phone waiver, so that you can have your cell phones in your pockets and to bring them upstairs. Just be sure they're turned on vibrate or some other silent method so I don't have phones ringing in the courtroom. And I can't

guarantee you that I'll be back at three or anytime close, but I'm not going to make you wait beyond sometime today for at least as much as I possibly can in the way of a ruling.

We're in recess.

(Whereupon a lunch recess was had.)

THE COURT: Have seats, please. I apologize for keeping you all waiting.

Ladies and gentlemen, consideration of the very lengthy arguments we heard today has clarified certain things in my mind and sensitized me to some nuances that I failed to pick up in my reading of the papers before the trial. But nothing I heard in oral argument has caused me to make material changes in the tentative rulings that I articulated at the start of the argument today.

I'm ruling that Motors Liquidation breached the settlement agreement and provisions of the plan when it provided the funding for the RACER Trust in the currency of securities rather than cash, though there's no evidence that Motors Liquidation did so out of any wrongful motive or even that it intended to breach any of those agreements at all. But I'm further ruling that the RACER Trust through its personnel who were acting for the RACER Trust waived Motors Liquidation breach and that the States, the Tribe, and if it matters, the Federal government, even though they may effectively be beneficiaries of the RACER Trust, though the U.S. is the actual

named beneficiary, can't escape the effect of those waivers or independently assert claims that to the extent they exist belong to the RACER Trust.

I'm further ruling that even if the RACER Trust hadn't waived the breach, its damages measured as of the time of the breach are zero, and I'm further ruling that the RACER Trust failed to mitigate its damages and that if it had mitigated, its damages likewise would have been zero.

So I'm denying the motion insofar as it asks me to rule that Motors Liquidation's breach requires it to pay an additional $13 million into the RACER Trust in order to comply with the settlement agreement plan or confirmation order. Putting it another way, I'm ruling that the RACER Trust is entitled to nothing further on account of its alleged loss. When I enter the order implementing this determination, the order will include provisions providing in substance that the RACER Trust will not have the right to the $13 million that was deposited into Court, and it will provide that when it becomes a final order, that $13 million may be returned to Motors Liquidation or to the Treasury as their interests may appear.

I'm outlining the reasons for these determinations now in some detail, and I'm laying out my most important findings of fact. After they hear them, the RACER Trust and its allies can think about whether any of them will want to appeal. Until I know their desires in that respect, I'm going

to be deferring entry of the order on this ruling so as not to start the clock on appellate brief writing prematurely, and I'll consider then whether I should prepare a formal written opinion to more fully flesh out all of the findings of fact, conclusions of law, and other bases for this decision.

Turning first to the issue of breach; I determine as mixed questions of fact and law that there were two separate breaches of contract here of two separate agreements or documents that should be regarded as such, though I see no evidence, much less persuasive evidence, that Motors Liquidation, Treasury, or anyone else intended to commit a breach, or especially acted with any kind of evil purpose or malice. In fact, as I said in oral argument, this entire episode is a classic example of no good deed goes unpunished. Let's look at the key documents that are relevant to the claims of breach. The first is the settlement agreement which was entered into October 20, 2010. It provided in its paragraph 32 in relevant part, "Debtors shall make a payment to fund the Environmental Response Trust in the amount of no less than dollars 641,434,495." That language is somewhat ambiguous in the respect relevant here as it does not describe the currency by which that payment would be made, but of course the contractual provision that I just quoted does not say in words or substance that the debtors will deliver value in that amount, nor that they'll deliver anything other than cash. It

does, of course, refer to quote, "payment," quote, and use a dollar sign, both of which would normally be thought of as calling for payment in cash. And more importantly it does not describe the obligation as one to deliver securities of a value of the stated amount which is the more normal way by which an understanding to fund the RACER Trust with securities in whole or in part would be expressed.

The next relevant document is the plan which was the subject of the confirmation order which approved it and which was entered on March 28, 2011. All parties agree, or should, that the plan was effectively a contract and that it could be enforced as such. The plan provided in relevant part, and I'm quoting, "The Environmental Response Trust assets shall be comprised of," little I in the whole, initial-capped "Cash in the amount of dollars 641,434,945, less any deductions made pursuant to paragraph 36 of the Environmental Response Trust consent decree and settlement agreement." I was quoting from plan article 1.68.

The plan further provided, and again I'm quoting, "On the effective date, the Debtors shall transfer all the Environmental Response Trust assets to the Environmental Response Trust," comma, "as provided in and subject to the provisions of the Environmental Response Trust consent decree and settlement agreement. Such transfer shall include the transfer of Environmental Response Trust Cash," with a capital

C, "in the amount of dollars 641,434,945." I was quoting from plan article 6.4(c).

Under the plan and its article 1.33, the capitalized term, quote, initial caps, "Cash," end quote, was defined as quote, "legal tender of the United States of America," comma, quote, which obviously excludes securities, comma, even U.S. Government obligations which I find have minimal risk. The provisions in the confirmation order weren't as specific, but they didn't undercut those very clear provisions that I just quoted. Payment in cash was also described as the mechanism for future performance at page 84 of the plan's disclosure statement describing the funding of the RACER Trust. It provided, and I'm quoting, "Such transfer shall include the transfer of" initial caps, "Cash in the amount of dollars 641 million." I don't think I need to add the rest.

Now it's true as Motors Liquidation has pointed out that a balance sheet for the debtor and certain of its affiliates dated December 31, 2010, showed on a consolidated basis, quote, "Cash and cash equivalence," comma, quote, and that a footnote 6 to it said, and I'm quoting, "Cash and cash equivalence represent cash and investments in U.S. Treasury or U.S. Treasury-backed securities with the maturity of 15 years or less." But that related to a line item that covered not just the Environmental Response Trust, which was the predecessor to the RACER Trust, but also the Asbestos Trust,

the GUC Trust, and Motors Liquidation itself. A separate footnote 4 to that balance sheet disclosed that cash and cash equivalence had been contributed to the Environmental Response Trust, but that footnote described the past performance under the settlement agreement that in fact took place in 2010 as contrasted to purporting to describe the contractual obligation that was imposed on Motors Liquidation going forward.

So I find, based on all of that contractual language that I read to you, that Motors Liquidation's contractual obligation was to contribute cash, green money of the United States, and that the contribution that was made instead was by a means of cash, TIPS, and other U.S. Government securities instead. You can call that a technical breach, in part because I find no intent to breach, and indeed the breach to be a totally innocent one, or you can regard, quote, "technical," quote, as an irrelevancy in this context and simply call it a breach. Either way, the delivery of securities in lieu of cash was different than the performance that the contract called for and it was a breach.

Yet one of the reasons I say no good deed goes unpunished is that the mechanism that was used providing for TIPS and other government securities was used because it was then unclear when the plan would be confirmed and go effective and the funders wanted to ensure that the ability to fund the RACER Trust would be protected. Even at the oral argument

today, everyone I heard from noted that delivering securities, and especially laddered as they were, was a good idea. So we have the odd situation where there was a breach but nobody disputes that the concept underlying the delivery of the securities was a good one. It just wasn't what the contractual documents called for, and nobody bothered to change them.

So while I find a breach, I must make one thing very clear, and it's a point with which I must respectfully find fault with the RACER Trust and its allies. Two separate arguments as to claims of breach were made, and they were badly intertwined. They need to be sliced and diced. One claim of breach, which I sustain, is the failure to deliver on the contractual entitlement to cash as contrasted to securities. That breach violated the settlement agreement, that being contract number one, and the plan, that being contract number two. But the other kind of breach which was confused with the breach that I just described was allegedly that Motors Liquidation breached by providing securities but not delivering enough of them, because they were valued using the wrong mechanism. And that contention of breach I reject as a fact or as a mixed question of fact and law.

The first argument was legitimate, and as I just noted, I agree with it, though I will ultimately find as I'll discuss below that it was no harm, no foul. The second of the two alleged types of breach is based on a complaint that has no

basis in the underlying contracts. The RACER Trust can't argue that it had had an entitlement to securities but with a different valuation because that isn't what any of the relevant contracts said. Over and over again, I heard an oral argument, and in the briefs before it, that the delivery of the securities, especially in the ladder form in which they were delivered, was fine, but that another $13 million of value for that currency had to be delivered. That isn't what the contract said, and I expressly find, again as a mixed question of fact and law, that I am not finding a breach of the latter type. Evidence of an obligation of that character was wholly lacking.

Turning next to the matter of waiver; as I indicated at the outset, while I find a breach, I find as a mixed question of fact and law, or as a fact, that it was waived. The evidence is undisputed that back in August or September 2010, Laws and Hill were selected to act as Trustees for the RACER Trust, and in September 2010, they were provided with detailed presentations from which they could and did discover that the RACER Trust would be funded with securities, mainly TIPS, and not cash. It's less clear that Laws and Hill were then informed as to how the TIPS would be valued, and I assume that they were not then told about the valuation technique, but I don't find that to be particularly significant because as I noted, the breach was in the funding in the currency of

securities rather than cash, and the valuation of those securities is irrelevant except as it might affect damages. In a presentation delivered to Laws and Hill on or about November 4, 2010, evidenced by a PowerPoint that was introduced in evidence, Laws and Hill were advised in detail as to how the entity that would become the RACER Trust would be funded. The third page of the PowerPoint showed six series of TIPS, two Zero-Coupon Treasuries, another kind of Treasury, and a T-Bill. They did not protest. This I note is after the settlement agreement was signed up, but before the plan was confirmed. I also note that at that meeting, those present discussed the securities custody account that would have to be set up to hold the Treasury securities that would ultimately be delivered to the Trust. There can be no doubt, and I find as a fact, that at least by this date, if not sooner, the Trustees of the RACER Trust were on notice that the RACER Trust wasn't going to be funded in cash.

The disclosure statement published on or about December 8, 2010, after the entry into the settlement agreement, and of course before confirmation of the plan, included as I noted a footnote 4 that stated that not just cash, but also cash equivalence, which I find that most businesspeople would understand to be securities, and more importantly something different than cash, had been contributed to the Trust. I note that the disclosure was in the footnotes

to a balance sheet that described the Trust with the acronym Environmental Response Trust, hardly screaming out what it showed, and that there was language elsewhere in the disclosure statement which I previously quoted which would suggest to the reader that the funding of the RACER Trust would be in real cash.

So I don't place great reliance on the footnotes to the financial statement to the balance sheet that appeared in the disclosure statement, but I don't need to place great reliance on that because the personalized PowerPoint presentation that I talked about a moment ago, which was delivered in early November 2010, had already stated in excruciating detail how the funding would be made. It made it at length and in unmistakable terms.

As I also have discussed, at least in part a moment ago, the RACER Trust was told that it would have to set up custodial accounts or at least one to take the securities it would be given. After knowing that, after knowing that it would be getting securities instead of cash, the RACER Trust made preparations to accept them on the effective date by creating custodial accounts to hold them in advance. Before establishing those custodial accounts, or for that matter afterwards, it did not then say, quote, "Why are you giving us securities? We're entitled to cash, green money," end quote. And then again, on or about March 31, 2011, the RACER Trust

accepted the securities as the funding currency and it did so without protest.

Then the RACER Trust completed a true-up payment in June 2011. At that time, it made a $108,000 payment to the debtors which was necessitated at least in part by the fact that the RACER Trust had been funded with securities and not just cash. Then there was a delay from March 31, 2011 to at least June 17, 2011 in raising any complaint. In fact, I think the better way to measure the relevant delay is from March 31, 2011 to October 12, 2011, almost nine months later. It wasn't until June 17, 2011 that the RACER Trust said anything. At that time, Elliot Laws sent an e-mail to Mark Dowd at Treasury stating that, and I'm quoting, "I would like to raise a recently identified discrepancy between U.S. Bank's market-based valuation of the bonds and the value that MLC assigned to those bonds. This $15 million discrepancy was identified during our review of U.S. Bank's April statements." And it wasn't until October 12, 2011 that the RACER Trust said more. At that time, Michael Hill of the RACER Trust sent an e-mail to various attorneys at the Department of Justice asking, and I'm quoting, "to discuss with you or others acting on behalf of the U.S. as Trust beneficiary, an apparent effective date underfunding of the Trust."

I note that neither of these messages talked about the actual breach that I've found, the submission of securities

instead of cash. They talked about underfunding of the RACER Trust which as I've explained is not a legitimate claim. With respect to the actual failure to comply with the contract, delivering securities instead of cash, there was a waiver at least through October 2011, eight months after the funding, and about a year after Hill and Laws were told that the bargain for performance wouldn't be forthcoming. It's possible that for waiver purposes, a delay of that duration, either eight months or more, precisely a year, is the better measure, and that even though the complaint was for the wrong reason, it reflected an intention no longer to live with the contractual performance that had been delivered. Frankly I think that if there was no complaint based on the real objectionable conduct, the waiver was continuing even longer. Either way, all of that acquiescence for such a long time is a paradigmatic example of a waiver.

Now for the avoidance of doubt, I don't consider all of the events either before or after the effective date of the plan on March 31, 2011, to have resulted in an amendment of the original contracts. But the matters that I just discussed very, very strongly evidence the RACER Trust's acquiescence in the form of performance that Motors Liquidation was tendering until the RACER Trust realized that it could potentially secure more in the way of funding by making the arguments that I have before me today. Now in responding to the waiver concerns, the

RACER Trust contends that while it was aware that it was getting securities, it wasn't aware of how they would be valued and that it was the amount of the securities that was troublesome to it, and that the amount of the securities was insufficient. It's really on that premise that the RACER Trust contends that it didn't waive the issues that it has raised here. Well, that's not an answer. The RACER Trust valuation concern doesn't go to an entitlement under the contract. Just as the contract didn't provide for performance by delivery of the securities, it didn't provide for a mechanism for the valuation of them. It didn't say how they should be valued. That's because securities weren't supposed to be delivered. In essence, the RACER Trust is basing its defense to Motors Liquidation's waiver contentions on contractual obligations that did not exist.

I'm also unpersuaded by the argument that all of these events don't count because some or all of the States and the Tribe weren't privy to everything that was happening. The RACER Trust was established as the vehicle for meeting their needs and concerns along with those of the Government or at least the EPA, Department of Justice Environmental Division side of the Government. And Hills, Laws, and Hamilton were the agents for the RACER Trust. It was the RACER Trust that would take the assets and manage them for the ultimate environmental remediation needs of the State and the Tribe. Having heard

points that the U.S. Attorney made, I don't rule that the Trust was the agent for its beneficiaries or its effective beneficiaries, but I likewise can't rule and don't rule that such beneficiaries have the independent right or standing to enforce claims based on obligations running to the Trust. The States and Tribe could, I suppose, have negotiated for their own Trust, or they could have negotiated for additional rights with respect to the RACER Trust itself, or to be exempted from the consequences of the actions that the Trustees or other personnel of the RACER Trust took. But of course they didn't do that nor has there been a claim that they did so. The entity with rights, if any, with respect to any Motors Liquidation non-performance is the RACER Trust. Likewise, the RACER Trust must live with any defenses to its efforts to enforce its rights, including waiver defenses arising from the acts of its agents.

Turning next to my conclusion that the damages were zero; I further find that as of the time of the breach, which I agree should be the appropriate time at which damages are measured under New York law, Motors Liquidation had delivered securities of a value equal to the cash that Motors Liquidation was obligated to pay, and thus, that even if the breach hadn't been waived, the RACER Trust damages must be zero. Neither of the two methods for valuing the securities that I heard about in the briefing and argument before me is in my view an, quote,

"accounting gimmick," quote, as each side accuses the other of having employed. But I think that ultimately under the facts here, references of that character and accusations of that character are just rhetoric. I agree that what is appropriate for recording and reflecting the value of a corporation's assets for financial reporting purposes is not necessarily the same as its valuation of those assets for other purposes, such as a fair market valuation, but a method consistent with FASB standards and GAP isn't necessarily wrong for that purpose either. As I, and I think most triers of fact, would be skeptical of a valuation of an asset that was contemplated to be held for a long time, but could be subject to short-term volatility or fluctuations in its value. In fact, I think and find that for valuing an asset that's to be held for a long time and where the facts don't reflect an intent to sell off the asset in the short term, or to be trading it, especially on a day-to-day basis, in the short term, the Motors Liquidation valuation approach is the right one. Putting it differently, because I had a lot of subordinate clauses there, if I had an asset that was being traded day to day, or that people knew was going to be disposed of quickly, I would be more inclined to look to short-term market trading values. Conversely, for an asset that is not to be disposed of that quickly, and which is to be held for a materially longer period of time, it is not only appropriate but the right choice to value it using

mechanisms that take into account that longer holding period. As all seem to agree, valuation techniques are best applied when taking into account the purpose for which the valuation is made. That principal is codified in Section 506(a) of the Bankruptcy Code which provides the valuations for the purposes of that section are to be made with a view as to the purposes of the valuation. Section 506(a) provides, and I'm quoting, "Such value shall be determined in light of the purpose of the valuation, and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditors' interest."

Those principals, while plainly having been articulated in a somewhat different context, reflect an underlying understanding as to valuation that has utility in many contexts, as I think all who have spoken on that subject agree and indeed have acknowledged. Once again, if the securities had been delivered to the RACER Trust with the understanding that they'd be actively traded on a day-to-day basis, I might very well agree that a valuation based on then-prevailing market trading prices would be appropriate, and indeed that perhaps they should be marked to market. But here the shared intent was exactly the opposite. The securities were purchased under a laddered structure with a variety of specific maturities to reflect the times at which those

securities' principal would most likely need to be realized. That was expressly discussed at the meeting of November 4. Valuing those securities, taking into account the purpose for which they were obtained, is the most appropriate way to value them, and when they are valued in that fashion, they are worth exactly what Motors Liquidation contended they'd be worth. And that's particularly true here since, as we all know, if the RACER Trust simply held the TIPS and the other Treasury securities until maturity, it could achieve payment in full. There was no material credit risk here. The U.S. Government isn't Greece. It was good for the money, and in fact, 55 percent of the securities were TIPS, which would give the RACER Trust the best of both worlds; protection against downside risk, guaranteeing payment at least at par, and additionally offering protection against inflation. That's better than delivery in the form of cash, and at the least is, as I find, no harm, no foul, once again demonstrating that the damages are zero.

If Motors Liquidation had complied with its contractual obligation to fund the RACER Trust with cash, that cash wouldn't have appreciated. It would be worth the same now as it was on March 31, 2011. It would also be worth the same at the maturity of each of the securities that it was worth back then. If the RACER Trust simply held on to what it got, it would have obtained the exact same benefit of its bargain.

Then I think there's a great irony here. The RACER Trust contractual entitlement as I've noted more than once was to payment in cash. But the RACER Trust has told us it would have invested the cash in laddered securities of the very type that it got. Frankly, I think that the RACER Trust's statements to me on this matter as to what it might have done with the cash if it had received cash are self-serving and speculative. And in New York, if not everywhere else, damages for breach of contract can't be speculative. But ironically, what I was told was that if it got cash, the RACER Trust would put its cash in exactly the same laddered securities it got. It just wants more money to have accomplished that. But that, once again, isn't its contractual entitlement. Motors Liquidation breach had nothing to do with the valuation of the securities that Motors Liquidation delivered. Motors Liquidation's offense, if I can call it that, was solely in delivering securities in lieu of cash.

The securities that Motors Liquidation delivered have paid and will continue to pay interest, and as importantly or more so, they'll yield their full principal upon maturity. If the RACER Trust and those looking to the Trust for environmental remediation are patient, they'll get value exactly to what their contract offered them. Anything more than that would be a windfall. And the Courts of New York, if not others, have repeatedly noted that the purpose of

contractual damages are not to award windfalls, but to make parties injured by breaches of contract whole for the actual losses they suffered.

Turning finally to mitigation of damages; it's undisputed that if the RACER Trust wants to return the securities now for the cash that the RACER Trust is entitled to, Motors Liquidation is willing to accept the securities back from the RACER Trust, liquidate them, and to give the RACER Trust the cash it was promised with interest. That, of course, was confirmed by the letter of November 17, 2011, sent by Mr. Berz. RACER Trust's unwillingness to get the performance under the contract to which it was entitled is a failure to mitigate damages. If the RACER Trust took that offer, it would have no damages because we must remember the breach was the failure to give the RACER Trust cash, not to give the RACER Trust securities based on a valuation method that the RACER Trust prefers. The RACER Trust could also mitigate damages by simply holding the TIPS until maturity. Then, too, it would have the exact cash it was promised since all agree that there would be no credit risk associated with that course.

Finally, if the RACER Trust were to sell its securities on the open market today, it could then turn them into cash and it could get all the cash it was entitled to with no loss, in fact, with a $31 million profit, and that would provide it with the third means for it to mitigate its damages.

The RACER Trust doesn't have to do any of those things, of course, but if it chooses not to do so, and so far, of course, it has intentionally chosen not to do so, it can't expect Motors Liquidation to pay for the RACER Trust's non-existent loss. In substance, giving the RACER Trust the extra $13 million would, as Motors Liquidation argues, give the RACER Trust a windfall. And as Motors Liquidation pointed out, and as I pointed out in a different context a moment ago, there are many cases under New York law saying that when awarding damages for a breach of contract, we don't award windfalls. But the more precise way of articulating my concerns with the RACER Trust position, I think, is that the RACER Trust is asking for much more than it needs to make it whole, to restore it to the position it would have been in, if it had secured strict performance of Motors Liquidation's contractual obligations with the currency for which the settling parties agree. The RACER Trust already got that. We don't need to give it any more to make it whole.

Now, ladies and gentlemen, I think you heard what I said, and certainly you can get this ruling transcribed. I'm going to suggest to the RACER Trust and its allies that you think about these findings of fact, that you think about these mixed questions of fact and law conclusions that I've reached, and that you make a decision as to whether you're going to want to take an appeal. I'm intentionally going to hold off

entering an order consistent with this decision to allow you to do that. If you tell me that you want to take it up on appeal, then I'll consider whether the determination that I've made and that I've dictated for roughly the last hour should be converted into more formal findings of fact and law and should have case citations. I don't think it would be a productive exercise for me to do that unless I know that the RACER Trust really disputes what I've come to conclude. Until then, of course, all parties' rights are reserved. I well understand that the practical consequence of this course of action is that the 13 million bucks stays in the registry of the Court for a longer period of time, but subject to your rights to be heard, I'm unlikely to authorize the release of those funds until there has been a final order on this controversy in favor of one side or the other.

There is no immediate time limit that I'm now imposing for the RACER Trust and its allies to decide what they want to do. I'll simply rely on your good faith and your diligence in that regard.

And with that, ladies and gentlemen, we're adjourned.

(Whereupon these proceedings were concluded at 5:02 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Nick Gereffi, certify that the foregoing transcript is a true and accurate record of the proceedings.

Nick Gereffi

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